Supreme Court, U.S.
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No. 09-

IN THE
Supreme Court of the United States

AMES DEPARTMENT STORES, INC., *et al.*,
Petitioners,

v.

ASM CAPITAL, L.P.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Second Circuit err in holding the words "any claim of any entity" in section 502(d) of the Bankruptcy Code exclude administrative expense claims of any entity, when:

(a) The practical effect of ruling that "any claim" does not mean "any claim," is to create the absurdity that Debtors must pay administrative expense claims totaling $393,000 when the original administrative creditor will be unable to repay to Debtors an $825,000 preference judgment?

(b) The plain meaning of "any claim" does not exclude administrative expense claims?

(c) Section 101(5)(A) defines "claim" to mean "right to payment," and administrative expense claims are indisputably rights to payment?

(d) Sections 1123(a)(1) and 1129(a)(9)(A), among many others, refer to the administrative expenses prioritized in section 507(a)(1) [now 507(a)(2)] as "claims"?

(e) Congress showed in section 101(10) that it knows how to exclude 'administrative expense claims' from 'claims' by specifying that a claim of a "creditor" means a claim of an entity that arose at the time of or before the order for

relief or that by special designation by Congress are deemed to have arisen prepetition? and

(f) Congress used the phrase "any claim of any entity" in section 502(d) when it could have used the phrase "any claim of any creditor" if it wanted to exclude entities holding administrative expense claims?

PARTIES TO THE PROCEEDING

Petitioners in this case are Ames Department Stores, Inc., Ames Merchandising Corporation, Amesplace.com, Inc., Ames Realty II Inc., and Ames Transportation Systems, Inc., debtors and debtors in possession in the title 11 cases from which this petition arises.

Respondent in this case is ASM Capital, L.P.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioner Ames Department Stores, Inc. has issued shares of its stock to the public, which were traded on NASDAQ until September 18, 2001. Ames Department Stores, Inc. has no parent corporation and there is no publicly held corporation that holds more than 10% of its stock. Petitioners Ames Merchandising Corporation, Amesplace.com, Inc., Ames Realty II Inc., and Ames Transportation Systems, Inc. have not issued shares to the public and are wholly-owned subsidiaries of Ames Department Stores, Inc.

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Ames Department Stores, Inc. and its debtor affiliates (collectively, "Debtors") respectfully petition for a writ of *certiorari* to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's opinion (Appendix to the Petition ["App-"] 1a-23a) is reported at 582 F.3d 422 (2d Cir. 2009). The opinion of the United States District Court for the Southern District of New York ("District Court") (App-24a-25a) is not reported. The opinion of the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court") (App-26a-45a) is not reported. The Bankruptcy Court's subject matter jurisdiction is granted by 28 U.S.C. §1334.

JURISDICTION

The judgment of the Second Circuit, vacating the decision of the District Court and remanding the matter back to the Bankruptcy Court for further proceedings consistent with its opinion, was entered on September 18, 2009. App-1a-23a. The subject matter jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. §502(d) provides:

> Notwithstanding subsection (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title

> or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

11 U.S.C. §503 (1994) is set out in full in the Appendix to the Petition at App-65a-67a.

STATEMENT OF THE CASE

Synopsis of Underlying Dispute. Before and after the Debtors commenced their chapter 11 cases, they purchased goods from G&A Sales, Inc. ("G&A"). During the chapter 11 cases, Debtors ceased operations and procured a judgment against G&A in the approximate amount of $825,000 representing liability to disgorge preferential payments Debtors had made to G&A during the 90 days before bankruptcy. App-5a. G&A held approximately $393,000 in administrative expense claims. App-3a. G&A sold its $393,000 administrative expense claims to respondent, ASM Capital, LP ("ASM"). App-3a. G&A then commenced its own bankruptcy case and transferred its assets to its secured creditor, making it highly unlikely G&A could ever satisfy the $825,000 judgment. App-7a.

Based on 11 U.S.C. §502(d), Debtors asserted G&A's administrative expense claims purchased by ASM could not be allowed and paid until the $825,000 in preferences were repaid. App-5a. ASM asserted that section 502(d) does not apply to administrative expense claims and that

even if it does, ASM, as a transferee, would not have section 502(d) liability. App-6a. The Second Circuit reversed the lower courts and held section 502(d) does not apply to administrative expense claims. Therefore, it did not address the transferee issue. App-22a-23a.

Reasons to Grant Certiorari. The Second Circuit's holding directly conflicts with the decision of the United States Court of Appeals for the Eighth Circuit in *Weber v. Mickelson (In re Colonial Servs. Co.)*, 480 F.2d 747 (8th Cir. 1973), which held 502(d)'s predecessor provision, section 57g of the Bankruptcy Act of 1898 ("Bankruptcy Act"), applied to administrative expense claims. *Id.* at 749.

Moreover, this issue arises in virtually every chapter 11 case and continues to spawn confusion and diverse opinions from multiple lower courts. The Second Circuit's holding creates the absurdity that Debtors must pay administrative expense claims of $393,000 even when the original administrative claimant (G&A) owes Debtors $825,000 in preference payments and G&A is itself in bankruptcy and likely unable to pay.

Additionally, the Second Circuit's holding: (a)(i) overrides the plain meaning of the statute (*i.e.*, "any claim of any entity" plainly does not exclude administrative expense claims), (ii) does not contend the plain meaning of the statute produces an absurd result, and (iii) raises the concerns Justice Scalia raised in *Patterson v. Shumate*, 504 U.S. 753, 766 (1992) (Scalia, J., concurring opinion), about statutory construction and our nation remaining a government of laws, and (b) overrides the teachings of Supreme Court decisions refusing to limit or condition plain language of the

Bankruptcy Code when there is no contention of a scrivener's error or an absurd result, *see, e.g.*, *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991) (refusing to limit preference exception by imposing short term debt limitation not mentioned in statute), and *Toibb v. Radloff*, 501 U.S. 157, 160-61 (1991) (refusing to limit chapter 11 eligibility by imposing business requirement not mentioned in statute). Accordingly, a definitive ruling from the Supreme Court is critical to the uniform administration of bankruptcy law in virtually all chapter 11 cases across the country.

Procedural History. On August 20, 2001, Debtors each commenced a voluntary case under chapter 11 of the Bankruptcy Code. App-2a. On August 14, 2002, Debtors' boards of directors determined the value of their estates could be best maximized through an orderly wind down of their affairs in chapter 11. App-2a. Because Debtors did not know if they could ultimately pay all administrative expense claims in full, Debtors suspended payment to entities holding administrative expense claims to ensure a fair distribution to all claimants. App-5a.

In December 2004, the Debtors began making initial distributions to certain holders of administrative expense claims in an amount equal to forty percent (40%) of the allowed amount of the claims ("Interim Distributions"). App-5a. Interim Distributions were not offered to administrative expense claimholders that (i) were defendants in preference actions[1] ("Preference

[1] Debtors commenced litigation against more than 2,000 vendors seeking to avoid preferential transfers pursuant to section 547 of the Bankruptcy Code ("Preference Actions"). App-5a.

Defendants") or (ii) acquired claims from Preference Defendants, unless and until the underlying Preference Action was resolved and any preferences returned to the estates. App-5a.

ASM, a claims trader, purchased an administrative expense claim and a reclamation claim ("G&A Claims") held by G&A, one of Debtors' former vendors and a Preference Defendant. App-2a-3a.

On April 6, 2005, ASM filed in the Bankruptcy Court a request ("Request") for entry of an order allowing the G&A Claims. App-5a. At the time, the Preference Action against G&A had not been resolved. Accordingly, on April 15, 2005, the Debtors filed an objection to the Request, asserting section 502(d) required the Bankruptcy Court to disallow the G&A Claims until the Preference Action against G&A was resolved. App-5a.

On December 5, 2005, the Bankruptcy Court entered an order ("2005 Order") denying ASM's request for payment of the G&A Claims. App-6a. The 2005 Order provided the G&A Claims would be disallowed until the Preference Action against G&A was resolved and G&A paid or disgorged any amounts owing to the Debtors. App-6a. ASM attempted to appeal the 2005 Order, but the District Court dismissed the appeal for lack of finality. App-6a.

On June 19, 2006, the Debtors obtained a default judgment for preference liability against G&A in the amount of $825,138. App-7a. Debtors have not received payment from G&A or ASM to satisfy that judgment. App-7a.

On December 1, 2006, the Bankruptcy Court clarified its 2005 Order, making supplemental findings ("2006 Order"). App-6a. The Bankruptcy Court held the G&A Claims "would be temporarily disallowed until each of two things happened: ... (1) the [Preference] Action against G&A was 'resolved'; and (2) G&A had paid the amount (or turned over any property), if any, that had been judicially determined to be payable to the Ames estate." App-7a. The 2006 Order clarified that the "actual payback was a separate requirement for allowance," and this "second requirement ... remains unsatisfied—as the judgment [against G&A] has not been collected upon." App-7a.

On appeal, the District Court affirmed, stating it was "in complete agreement" with the Bankruptcy Court as well as the decision in *MicroAge, Inc. v. Viewsonic Corp. (In re MicroAge, Inc.)*, 291 B.R. 503 (B.A.P. 9th Cir. 2002), upon which the Bankruptcy Court relied. App-25a.

ASM appealed the District Court's decision.[2] App-8a.

On September 18, 2009, the Second Circuit vacated the decision of the District Court and remanded the matter back to the Bankruptcy Court for further proceedings consistent with its opinion. The Second Circuit found section 502(d) *did not* bar allowance of administrative expense claims held by a defendant in a preference action, notwithstanding such defendant's failure to return the preference. App-22a-23a.

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[2] The Second Circuit requested the parties brief the issue of finality of the order of the District Court. The Second Circuit found the order of the District Court was final.

The Second Circuit interpreted the phrase "any claim of any entity" in section 502(d) not to apply to administrative expense claims under section 503(b) of the Bankruptcy Code, App-19a-20a, and rejected the reasoning of the Bankruptcy Court, the District Court, and of the Bankruptcy Appellate Panel of the Ninth Circuit in *MicroAge*, which found (consistent with the pronouncements of this Court on the Bankruptcy Code's definition of "claim," *e.g.*, *FCC v. NextWave Pers. Commc'n Inc.*, 537 U.S. 293, 303 (2003); *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991); *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985)) that the definition of "claim" and its use in section 502(d) of the Bankruptcy Code encompasses both creditors' claims (*i.e.*, those claims that arose prepetition or are, by special designation by Congress, deemed to have arisen prepetition) and administrative expense claims under section 503(b), App-13a-14a.

The Second Circuit supplied no explanation why Congress drafted section 502(d) to apply to "any claim of any entity," if it meant 'any claim of any creditor.' Rather, the court reasoned, "section 507(a) refers to 'expenses *and* claims,' and establishes a separate priority for 'administrative expenses' than for 'claims.'" App-14a (emphasis in original). In fact, section 507(a) established nine separate priorities for nine different types of claims.[3] Administrative expenses are one of the

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[3] Unless otherwise noted, references to the Bankruptcy Code are to the version of the version in effect at the time Debtors' chapter 11 cases were commenced, which was prior to the date the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became effective.

nine types of claims lumped together for the assignment of priorities in payment and are expressly referred to as claims in, among others, sections 1123(a)(1) and 1129(a)(9)(A).

The Second Circuit also noted that Congress restricted the definition of "creditor" to only those holders of prepetition claims and claims deemed to arise prepetition set forth in sections 502(f)-(i) and 348(d) of the Bankruptcy Code, and not to holders of administrative expense claims. App-14a-15a. In doing so, the Second Circuit overlooked the fact that had Congress wanted to limit the application of section 502(d) to creditor claims, and exclude administrative expense claims, Congress could easily have drafted section 502(d) to apply to 'any claim of any creditor,' rather than "any claim of any entity." Yet, notwithstanding the actual language of section 502(d), disallowing "any claim of any entity," the Second Circuit held "[t]he language of section 502(d) suggests that it applies only in the context of section 502, and not to claims addressed by section 503." App-17a.

The Second Circuit further observed that section 501 applies only to creditor claims, and reasoned section 502 governs allowance of such claims, whereas section 503 refers to "entities," who can hold either creditor or administrative expense claims. The Second Circuit failed, however, to observe section 502(d) expressly refers to "any claim of any entity," showing Congress' conscious decision that section 502(d) apply by its terms to administrative expense claims. The Second Circuit reasoned section 503(b)'s "mandatory" allowance of administrative expense claims "suggest[s] a conflict with

section 502(d)'s equally mandatory disallowance of claims." App-17a-18a. That section 503(b) provides "[a]fter notice and a hearing" a claim "shall be allowed" shows Congress anticipated defenses to administrative expense claims, section 502(d) being one potential defense. The Second Circuit's notion of "mandatory allowance" lacks any jurisprudential or statutory support. Congress rendered *all claims* subject to defenses by providing for notice and a hearing. It is only mandatory that claims be allowed when there are no meritorious defenses.

The Second Circuit dismissed the Eighth Circuit's holding in *Weber*, stating that court "rested its conclusion upon 'the plain, unequivocal language of the statute'—which Congress changed in section 502(d) ...." App-22a n.6. As shown below, the change merely tracked the change in defined terms from the Bankruptcy Act to the Bankruptcy Code to maintain *Weber*'s result. Former Bankruptcy Act section 57g[4] disallowed "claims of creditors." "Creditor" was defined to mean a holder of a prepetition claim in cases under Chapters I-VII of the Bankruptcy Act, and a holder of any claim (prepetition or postpetition) in reorganization cases under Chapters X-XII.[5] Congress' change from

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[4] Bankruptcy Act section 57g, former 11 U.S.C. §93g, provided:

> The claims of creditors who have received or acquired preferences ... void or voidable under this title, shall not be allowed unless such creditors shall surrender such preferences....

[5] Bankruptcy Act section 1(11), former 11 U.S.C. §1(11), defined "creditor" to "include anyone who owns a debt, demand, (Cont'd)

"creditor" in Bankruptcy Act section 57g to "entity" in Bankruptcy Code section 502(d) shows a conscious intent to make section 502(d) applicable to all claims—including administrative expense claims—consistent with the holding in *Weber*.

Finally, the Second Circuit reasoned an entity would be less willing to do business with and extend postpetition credit to a debtor if it had reason to fear its administrative expense claim could be disallowed by a debtor alleging the entity received a preference. App-19a-21a (quoting *In re Lids Corp.*, 260 B.R. 680, 684 (Bankr. D. Del. 2001)). Realistically, however, an entity is still better off doing new business with a debtor because preference liability remains constant, whereas new business generates incremental profits with which to repay the preference.

(Cont'd)

or claim *provable* in bankruptcy...." (Emphasis added.) Pursuant to Bankruptcy Act section 1(14), former 11 U.S.C. §1(14), a "debt" included "any debt, demand, or claim provable in bankruptcy." In turn, Bankruptcy Act section 63, former 11 U.S.C. §103, limited "provable" debts to debts existing as of the filing of the bankruptcy petition. In reorganization cases under Chapters X, XI, and XII of the Bankruptcy Act, (i) there was no provability requirement, (ii) "creditor" was defined to mean the holder of any claim, Bankruptcy Act sections 106(4), 307(1), 406(5), former 11 U.S.C. §§506(4), 707(1), 806(5), and (iii) "claim" was defined to include all claims, without excluding postpetition administrative claims, Bankruptcy Act sections 106(1), 307(2), 406(2), former 11 U.S.C. §§506(1), 707(2), 806(2).

REASONS FOR GRANTING THE PETITION

As explained above, *certiorari* should be granted because (a) there is a conflict in the Circuits, (b) the issue arises in virtually all chapter 11 cases and continues to spawn conflicting decisions across the country, (c) the decision below defies the plain meaning of the statute, (d) the decision below creates an absurd result by overriding the plain meaning of the statute, and (e) the decision below defies prior Supreme Court rulings (i) on the meaning of "claim," and (ii) refusing to insert judicially-created limitations Congress did not write into the Bankruptcy Code.

I. The Decision Below Creates a Conflict Among the Courts of Appeals and Adds to the Conflict Existing Among Other Federal Courts Throughout the United States.

The Second Circuit's decision creates a direct and irreconcilable conflict with the holding of the only other court of appeals to address the issue—the Eighth Circuit in *Weber*, which held that Bankruptcy Act section 57g, was applicable to administrative expense claims. *Weber*, 480 F.2d at 749.

In *Weber*, an employee of the debtor filed an administrative expense claim accrued during the debtor's Chapter XI reorganization case for $4,733.33 "as compensation for services rendered to the bankruptcy during and in connection with the arrangement proceeding." *Id.* at 748. The trustee appointed after the case was converted to Chapters I-VII, objected to the Chapter XI administrative

expense claim and counterclaimed for $10,497.86 in preferential wages and expenses paid to Weber within the four months preceding the debtor's commencement of its Chapter XI case. The bankruptcy court held, and the district court affirmed, section 57g prohibited allowance of Weber's Chapter XI administrative expense claim until the preference was surrendered. *Id.* The Eighth Circuit agreed, "the plain, unequivocal language of the statute mandates surrender of a voided preference *before* a claim can be allowed ... even if the claim is a priority claim ... and therefore precludes allowing Weber's claim as a set off against repayment of the preference." *Id.* at 749 (emphasis added).

Former section 57g disallowed "the claims of creditors," and current section 502(d) disallows "any claim of any entity." Both statutes used the word "claim" without excluding administrative expense claims. The Bankruptcy Act used the word "creditor," defined in reorganization cases to mean a holder of prepetition or postpetition claims, *see* n.5, *supra*, the same way "entity" is defined in Bankruptcy Code section 101(15) without any exclusion for holders of administrative expense claims. In its effort to limit *Weber* to the statutory language of Bankruptcy Act section 57g, the Second Circuit failed to recognize that the changed language from "creditor" in Bankruptcy Act section 57g (meaning holders of prepetition or postpetition claims in reorganization cases such as Weber's Chapter XI case and prepetition claims in liquidation cases) to "entity" in Bankruptcy Code section 502(d) (meaning holders of prepetition or postpetition claims in both chapter 7 liquidation cases and chapter 11, 12, and 13 reorganization cases) codifies *Weber*.

Weber and its progeny formed the basis of the Ninth Circuit B.A.P.'s ruling in *MicroAge*, upon which Debtors, the Bankruptcy Court, and the District Court relied. *See* 291 B.R. at 509 ("Section 502(d) by its terms applies to 'any claim' of an entity that received an avoidable transfer, and the definition of a 'claim' in §101(5) is sufficiently broad to include requests for payment of expenses of administration.").

In addition to *Weber* and *MicroAge*, multiple precedents support Debtors' basic premise that the statute disallows administrative expenses of claimants owing preferences to the estate. *See Irving Trust Co. v. Frimitt*, 1 F. Supp. 16, 17 (S.D.N.Y. 1932) (denying offset of priority claims against fraudulent transfer because that would subvert §57g, which requires transferees of avoidable transfers to surrender transfers before having their claims allowed); *Movitz v. Baker (In re Triple Star Welding, Inc.)*, 324 B.R. 778, 796 (B.A.P. 9th Cir. 2005) (section 502(d) bars allowance of administrative expense claim until preferences are returned); *In re Eye Contact*, 97 B.R. 990, 992 (Bankr. W.D. Wis. 1989) (denying priority wage claim until claimant returned voidable payments received prepetition); *In re Bob Grissett Golf Shoppes, Inc.*, 50 B.R. 598, 607 (Bankr. E.D. Va. 1985) (section 502(d) is mandatory and requires disallowance of administrative claim); *Tidwell v. Atlanta Gas Light Co. (In re Georgia Steel, Inc.)*, 38 B.R. 829, 839-40 (Bankr. M.D. Ga. 1984) (section 502(d) bars payment of administrative expenses until preference is recovered, citing *Weber*).

Other courts have held that section 502(d) does not apply to administrative claims. *See In re Plastech*

Engineered Prods., 394 B.R. 147, 156 (Bankr. E.D. Mich. 2008) (section 502(d) does not bar allowance of administrative claim); *Roberds, Inc. v. Broyhill Furniture*, 315 B.R. 443, 476 (Bankr. S.D. Ohio 2004) (same, recognizing "a split in the case law on whether an administrative claim is subject to the requirements of ... §502(d)"); *Beasley Forest Prods. Inc. v. Durango Ga. Paper Co.*, 297 B.R. 326 (Bankr. S.D. Ga. 2003) (same); *Lids*, 260 B.R. at 683 (same); *Camelot Music, Inc. v. MHW Adver. & Public Relations Inc. (In re CM Holdings, Inc.)*, 264 B.R. 141, 157 (Bankr. D. Del. 2000) (same).

Subsequent to the Second Circuit's decision, at least one court has noted the presence of these multiple disparate rulings. *See In re Renew Energy, LLC*, No. 09-10491, 2009 Bankr. LEXIS 3352, *13-15 (Bankr. W.D. Wis. Sept. 30, 2009) (noting "Courts have divided on this issue," and declining to rule until preference deemed to be recoverable), *accord In re Modern Metal Prods. Co.*, No. 08 B 73908, 2009 Bankr. LEXIS 1258, *8 (Bankr. N.D. Ill. May 13, 2009) (declining to rule where "debtor has not yet asserted a preference transfer claim"); *In re USA Labs, Inc.*, No. 04-41587-BKC-RAM, 2006 Bankr. LEXIS 2394, *3 (Bankr. S.D. Fla. Apr. 13, 2006) ("courts have grappled with the issue of whether an administrative expense claim is subject to §502(d) with the result being a split in the case law").

The disparate rulings among the Circuits and in the lower federal courts require a single rule governing the application of 502(d) to administrative expense claims. A grant of *certiorari* is essential to the uniform administration of bankruptcy laws.

II. The Decision Below Conflicts with This Court's Precedents Concerning Statutory Construction.

A. The Second Circuit's Decision Conflicts With the Plain Meaning of Section 502(d) and Congress' Definition of "Claim."

The statutory language of section 502(d) is unambiguous:

> Notwithstanding subsection (a) and (b) of this section, the court ***shall disallow any claim of any entity*** from which property is recoverable ... unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable ....

11 U.S.C. §502(d) (emphasis added).

This Court has repeatedly held statutes must be interpreted according to their plain meaning unless the plain meaning produces an absurd result. Here, however, the Second Circuit's decision overrides the Bankruptcy Code's definition of (a) "claim"—which the Second Circuit itself recognized includes administrative expense claims—in interpreting the words "any claim" in section 502(d) to *exclude* administrative expense claims and (b) "entity," by interpreting the phrase "of any entity" in section 502(d), to mean "of any *creditor*." But, nowhere does the Second Circuit contend the words' actual definitions produce an absurd result. Therefore, the Second Circuit's interpretation violates this Court's fundamental principles of statutory construction.

This Court has extolled the importance of focusing on the "natural reading" of a statute. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13 (2000) ("It suffices that the natural reading of the text produces the result we announce."); *Patterson*, 504 U.S. at 758 (same). "[W]hen the statute's language is plain, the sole function of the courts ... is to enforce it according to its terms." *Hartford Underwriters*, 530 U.S. at 6 (quotations omitted) (quoting *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917)); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a **statute** what it **means** and **means** in a **statute** what it says there.") (emphasis added).

Emphasizing that a statute must be understood according to its plain language, this Court in *Patterson*, 504 U.S. 753, corrected numerous Courts of Appeals that found the phrase "applicable nonbankruptcy law" in section 541(c)(2) of the Bankruptcy Code referred exclusively to state law. *Id.* at 759. In that case, "[t]he text contain[ed] no limitation on 'applicable nonbankruptcy law' relating to the source of the law." *Id.* at 758.

Significantly, the plain meaning "construction of §541(c)(2)'s reference to 'applicable nonbankruptcy law' as including federal law accords with prevailing interpretations of that phrase as it appears elsewhere in the Code." *Id.* at 758 n.2 (citing *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs*, 461 U.S. 624, 633 (1983) ("a word is presumed to have

the same meaning in all subsections of the same statute")); *see also id.* at 766-67 (Scalia, J., concurring).

If the word "claim" is to have the same meaning throughout the Bankruptcy Code, the Second Circuit erred in interpreting the phrase "any claim" in section 502(d) to exclude administrative expense claims as surely as the various Courts of Appeals erred in interpreting the phrase "applicable nonbankruptcy law" in section 541(c)(2) to exclude federal law. Moreover, after employing the phrase "any claim" in section 502(d), Congress added "of any entity." Had Congress intended to limit the reach of section 502(d) to exclude administrative expense claims, it would have added "of any creditor," "creditor" being defined to mean only holders of prepetition and deemed prepetition claims.

Section 502(d) clearly states, when a claimant has a claim against the bankrupt estate, section 502(d) bars that claim until any preference is turned over. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 371 (2006) ("[I]f the State has a claim against the bankrupt estate, the avoidance determination operates to bar that claim until the preference is turned over."). This prohibition applies with equal force whether the "claim" is a creditor claim or an entity claim because "entity" is used in section 502(d) and encompasses "creditor," while "creditor" is not used in section 502(d) and does not encompass "entity."

Section 502(d) expressly applies to any *claim* of any entity. Congress defined "claim" in the Bankruptcy Code as broadly as possible—broadly enough to encompass both creditor claims and administrative expense claims

under section 503. 11 U.S.C. §101(5)(A) ("claim" means "*right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured") (emphasis added); S. Rep. No. 95-989, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5808 (describing the definition of "claim" as "th[e] broadest possible definition"). This Court has repeatedly held the definition of "claim" has "the broadest available definition." *FCC*, 537 U.S. at 303; *Johnson*, 501 U.S. at 83 ("Congress intended by this language to adopt the broadest available definition of 'claim.'"); *Davenport*, 495 U.S. at 559; *Kovacs*, 469 U.S. at 279. This Court has also recognized administrative expenses are "claims" befitting that definition. *See Hartford*, 530 U.S. at 5-6 (referring to administrative expenses as "administrative claims" and its holders as "administrative claimants").

The Second Circuit did not dispute administrative expense claims are "claims" within the meaning of the Bankruptcy Code. App-15a ("the definition of 'claim' in section 101(5) does not distinguish between prepetition and postpetition rights to payment"). Instead, the Second Circuit determined—based on language found nowhere in section 502(d) and expressly refuted by its actual language—that 502(d) applies only to *certain* claims—creditor claims—and not to entity claims, including administrative expense claims. The Second Circuit reasoned, "the express exclusion of administrative expense claims from section 348(d), and the exclusion of administrative claim holders from the definition of 'creditor,' lend 'support to the view that administrative expense claims are claims that are

entitled to distinct treatment separate and apart from pre-petition, or deemed pre-petition, creditor claims.'" App-15a (quoting *CM Holdings*, 264 B.R. at 158). Thus, because Congress provided for different treatment of creditor claims and administrative expense claims, the Second Circuit reasoned the plain, unqualified use of the word "claim" in section 502(d) must cloak an unstated intent by Congress to have the provision apply only to creditor claims. Given that Congress assigned eight (now nine) types of prepetition claims different priorities in section 507(a) and different treatments in section 1129(a)(9), the Second Circuit's logic fails to explain why section 502(d) excludes administrative claims, but not those types of prepetition claims.

In contrast with the Second Circuit's interpretation, section 502(d) expressly applies to any claim of any *entity*, not just claims held by "creditors." "Entity" is defined broadly in the Bankruptcy Code, including any "person, estate, trust, governmental unit, [or] United States trustee." 11 U.S.C. §101(15). Whereas any "entity" may be the holder of any "claim," a "creditor" is defined more narrowly as an entity holding a prepetition claim or a claim deemed to have accrued prepetition. *Id.* §101(10). Thus, the fact that section 502(d), by its terms, applies to "any entity" and not to any creditor shows Congress intended section 502(d) to apply to all holders of all claims (including administrative expense claims).

For further support, the Second Circuit looked to section 507(a) of the Bankruptcy Code, which refers to "expenses *and* claims" (emphasis added), and establishes a separate priority for "administrative expenses" than

for "claims." App-14a. Contrary to the Second Circuit's rationale, many provisions in the Bankruptcy Code refer to administrative expenses as "claims," evidencing Congress' enactment that administrative expenses are claims. Indeed, section 507 itself refers to "administrative expenses" as "claim[s]." 11 U.S.C. §507(b) (referring to "a claim allowable under subsection (a)(1) of this section"); *see also*, *e.g.*, 11 U.S.C. §§346(e) ("claim allowed under section 502(f) or 503") (repealed 2005); 348(d) (referring to "a claim specified in section 503(b)"); 365(n)(2)(C)(ii) (same); 726(b) (same); 726(c)(1) (same); 726(c)(2) (same); 1326(a)(2) (same); 1123(a)(1) ("claims of a kind specified in section 507(a)(1)," which in turn consists *only* of "administrative expenses"); 1129(a)(9)(A) (same); 1326(b)(1) (same).[6]

The fact that Congress created separate treatment for administrative expense claims and other claims only reinforces the fact that Congress knows how to distinguish treatment between administrative expense claims and other species of claims, and does so explicitly throughout the Bankruptcy Code when it intends to do so. *See*, *e.g.*, 11 U.S.C. §§348(d) ("other than a claim specified in section 503(b)"); 752(a) (excepting "claims of the kind specified in section 507(a)(1)"); 1123(a)(1) (same); *cf. Patterson*, 504 U.S. at 758 ("Congress, when it desired to do so, knew how to restrict the scope of applicable law to 'state law' and did so with some frequency ...."). In contrast, section 502(d) contains no

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[6] Similarly, section 1141(d)(1)(A) discharges debtors from "any *debt* that arose before the date of ... confirmation" (emphasis added), and "debt," in turn, is defined as a "liability on a claim," 11 U.S.C. §101(12).

exclusion for claims specified in section 503(b). *See Cervantes-Ascencio v. U.S. Immigration & Naturalization Serv.*, 326 F.3d 83, 86 (2d Cir. 2003) (court presuming omissions are intentional and refusing to add provisions where Congress omitted them absent substantial contrary evidence), *cert. denied*, 540 U.S. 990 (2003).

The Second Circuit reasoned that, because section 502(d) begins with "notwithstanding subsections (a) and (b) of this section" and does not purport to override section 503, section 502(d) must not apply to administrative expenses claims under section 503(b). This ignores that section 502 automatically allows certain claims, whereas section 503 does not, and therefore section 502(d) can always be interposed as a defense to a claim at the hearing that section 503 requires. Under sections 502(a) and (b), a proof of claim is "deemed allowed" when filed, subject to objections and hearings to address such objections. This is distinct from section 503(a), where a postpetition administrative expense claim is not deemed allowed, but instead, is only allowed "after notice and a hearing." By including the "notwithstanding subsections (a) and (b) of this section" introduction, Congress drafted section 502(d) to specifically safeguard against the *automatic* allowance of claims granted by sections 502(a) and (b). Congress did not need to include such a proviso for section 503 claims because section 503 has a built-in requirement of notice and a hearing before administrative expense claims are allowed. Unlike a proof of claim, which constitutes prima facie evidence of the validity and

amount of the claim,[7] a request for payment of an administrative expense under section 503(a) carries no such presumptive effect and administrative expenses are not deemed allowed when filed. *See, e.g., In re Silvus*, 329 B.R. 193, 205 (Bankr. E.D. Va. 2005) (request for payment of administrative expense, unlike proof of claim, is not "deemed allowed" in absence of objection and does not constitute prima facie evidence of validity and amount of request). Indeed, it is well settled that, at a hearing to consider allowance of section 503 claims, a party in interest may raise section 502(d) as an affirmative defense. *See In re Mid Atl. Fund, Inc.*, 60 B.R. 604, 609 (Bankr. S.D.N.Y. 1986); *cited in El Paso v. Am. W. Airlines Inc.*, 217 F.3d 1161, 1167-68 (9th Cir. 2000); *In re Levine*, No. 94-44257, 2008 Bankr. LEXIS 2639 at *8-9, n.9 (Bankr. S.D.N.Y. Sept. 5, 2008) (trustee can assert otherwise time-barred preference claim defense to creditor's claim); *In re Asia Global Crossing, Ltd.*, 344 B.R. 247, 251 (Bankr. S.D.N.Y. 2006) ("the trustee can invoke section 502(d) even if the statute of limitations...has expired on the underlying avoidance claim."); *In re Metiom, Inc.*, 301 B.R. 634, 641 (Bankr. S.D.N.Y. 2003).

Moreover, section 502(c) provides for allowance of claims estimated by the court. The conspicuous absence of subsection (c) from the "notwithstanding" introductory language in section 502(d) supports the proposition that "notwithstanding subsections (a) and (b)" is not aimed at addressing the particular claims

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[7] Bankruptcy Rule 3001(f) provides: "A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim."

subject to subsections (a) and (b), but at the procedure for claim allowance in those subsections. Section 502(d) does not need similarly to circumvent subsection (c) for the same reason it need not reference section 503: the court is obligated under subsection (c) to hold an estimation hearing where a party in interest may raise section 502(d) as a defense.[8]

Thus, whereas the debtor or a party in interest may raise a 502(d) objection to a proof of claim pursuant to section 502(b), section 502(d) may be raised as a defense to a request for payment of an administrative expense pursuant to section 503(b) or estimation of allowed claims pursuant to 502(c). *See, e.g., MicroAge*, 291 B.R. at 512. The sections are complementary, not exclusive of one another.

A textual comparison of sections 501, 502, and 503 refutes the Second Circuit's suggestion that section 502(d) was intended to apply solely to claims for which a proof of claim must be filed pursuant to section 501. Section 501(a) provides, "a *creditor* ... may file a proof of claim" (emphasis added), and the provision continues to use the term "creditor" in subsections (b) and (c). In contrast, section 503 provides an "*entity* may timely file a request for payment of an administrative expense...." (Emphasis added.) That section 502(d) similarly refers to "any claim of any *entity*" (emphasis added) strongly evidences Congress' intent that 502(d)

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[8] The Second Circuit further ignored the fact that section 502(c) specifically states the estimation process will be for the purpose of allowance "*under this section*," showing that when Congress wanted to limit the scope of section 502 it did so explicitly.

should apply beyond claims of creditors to claims of entities, including administrative expense claimants.

The Second Circuit adopted the reasoning in *Lids* and *CM Holdings* finding Congress' decision to enumerate in sections 502(f)-(i) certain postpetition claims deemed to be prepetition claims somehow evidences its intent for 502(d) to apply to prepetition claims and those specific postpetition claims it determined should be deemed to be prepetition.[9] App-18a (citing *Lids*, 260 B.R. at 683-84 ("Congress'[s] inclusion of five postpetition claims to which section 502(d) expressly applies ... demonstrates that section 502(d) does not apply to other post-petition claims."); *CM Holdings*, 264 B.R. at 158 ("The express reference to, and treatment of, these other types of post-petition claims within the purview of §502(d) suggests by negative implication that the drafters did not intend that administrative expense claims be subject to the set off provision of §502(d)."). These decisions ignore that section 502(d) says "any claim" and does not separately reference these other postpetition claims. Congress defined "creditor" specifically to include entities holding both prepetition claims and those postpetition claims specified in sections 502(f)-(i). Thus, had Congress

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[9] The Second Circuit erroneously included section 502(e)(2) in this same category as if 502(e)(2) claims arise postpetition. App-18a. Section 502(e)(2) refers to claims for reimbursement or contribution by an entity that is liable with the debtor on or has secured the claim of a creditor. The obligations giving rise to such entity's right to reimbursement or contribution necessarily arise prepetition, though might not become "fixed" and not contingent until the claims are determined and allowed or disallowed in the course of the chapter 11 case.

wanted to limit section 502(d)'s application to prepetition claims and those enumerated in sections 502(f)-(i), it could have written section 502(d) to apply to "any claim of any creditor" rather than "any claim of any entity." Congress broadened the application of section 502(d) beyond claims of "creditors" to claims of "entities," which *a fortiori* include administrative expense claims.

Finally, the Second Circuit's conclusion that section 502(d) can only apply to other claims listed in section 502 despite the defined meanings of the words in section 502(d), ignores that Congress can deploy a statutory subsection to impact claims inside or outside that subsection. As Justice Thomas wrote in *Germain*, 503 U.S. at 253, "Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws ..., a court must give effect to both." The Second Circuit posited no positive repugnancy between section 502(d) and allowance of administrative expense claims in section 503(b). Indeed, the use of the word "allowed" in section 503(b) and "disallow" in section 502(d) show they are both aimed at the claims allowance process and are not inconsistent.

B. The Second Circuit's Decision is Inconsistent with the Stated Legislative Intent behind Section 502(d) of the Bankruptcy Code and the Legislative History and Prior Application of Section 57g of the Bankruptcy Act.

Section 502(d) succeeds section 57g of the former Bankruptcy Act of 1898, as amended.

The Second Circuit attempted to dismiss its conflict with the Eighth Circuit in *Weber* by asserting (a) the statutory language of section 502(d) changed from section 57g and (b) the Supreme Court recognized the reach of section 57g was "not entirely settled" in *Katchen v. Landry*, 382 U.S. 323, 330 n.5, (1966). Neither attempt to distinguish *Weber* succeeds. First, section 57g disallowed "claims" of "creditors" who held voidable transfers. Just like section 502(d), there was no limitation on the word "claims," to exclude administrative expense claims. Additionally, "creditor" was defined in the Bankruptcy Act's reorganization chapters (Chapters X, XI, XII) to mean holders of prepetition and postpetition claims. *See* n.5, *supra*. Second, *Katchen* cited 3 Collier on Bankruptcy, ¶57.19 [3.2] (14th ed. 1964), to identify what was "not entirely settled" about section 57g. There was no dispute about postpetition claims. Rather, the cited section in Colliers refers to uncertainty as to whether section 57g impacted secured claims because lienholders were not required to request payment or to file a proof of claim to have their liens survive bankruptcy.

In *U.S. v. Whiting Pools*, 462 U.S. 198, 208 (1983), this Court held that absent Congressional intent to depart from a practice under the Bankruptcy Act, the Bankruptcy Code should be interpreted consistent with precedent pre-dating the Bankruptcy Code. Here, the Second Circuit cited no legislative history evidencing any intent to deviate from section 57g.[10] Indeed, the Second Circuit concedes Congress wrote that section 502(d) was derived from the then present law:

> The Congressional reports issued in connection with the enactment of the Bankruptcy Reform Act of 1978 state only that section 502(d) was "derived from present law," and "requires disallowance of a claim of a transferee of a voidable transfer in toto if the transferee has not paid the amount or turned over the property received as required under the sections under which the transferee's liability arises."

App-21a, n.6 (citing S. Rep. No. 95-989, at 65, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5851; H.R. Rep. No. 95-595, at 354, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6310). Absent some expression that Congress intended for

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[10] *Accord Hartford*, 530 U.S. at 6 (past practice under Bankruptcy Act consistent with plain language of the Bankruptcy Code corroborated interpretation of the statutory text in accordance with its plain meaning); *see also Midlantic Nat'l Bank v. N.J. Dept. of Envtl. Prot.*, 474 U.S. 494, 501 (1986)); *Davenport*, 495 U.S. at 563 ("We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."); *Kelly v. Robinson*, 479 U.S. 36, 47 (1986).

section 502(d) to depart from *Weber's* construction and application of section 57g of the Act, section 502(d) should be interpreted in a manner consistent with past practice. *See Midlantic*, 474 U.S. at 501.

Just as with section 502(d), the language of section 57g was broad and applied to all "claims" of "creditors" in receipt of avoidable transfers. Section 57g did not by words or implication preclude its application to administrative expense claims and, indeed, courts interpreting section 57g found it applicable to administrative expense claims. *See, e.g., Weber*, 480 F.2d at 749; *Tidwell*, 38 B.R. at 839-40 (cited in *MicroAge*, 291 B.R. at 509) (finding "the fact that Atlanta Gas' claim is for an administrative expense has no bearing."); *Hudson Feather & Down Prods., Inc. v. B&B Assocs., Inc. (In re Hudson Feather & Down Prods., Inc.)*, 22 B.R. 247, 252-53 (Bankr. E.D.N.Y. 1982); *Irving Trust*, 1 F. Supp. at 17 ("the design of ... [57g] is that preferential or fraudulent transferees shall surrender their transfers in full before their claims to a dividend may be allowed.").

Against this backdrop, it is apparent Congress did not intend to depart from existing law when it adopted section 502(d). *MicroAge*, 219 B.R. at 508-09 (citing S. Rep. No. 95-989, at 65 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5851; H.R. Rep. No. 95-595, at 354 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6310). Indeed, Congress stated expressly that section 502(d) was "derived from present law." *Id.* Congress is,

> presumed to have known at the time it drafted §502(d) that courts had interpreted §57g in

> such a way as to be applicable to administrative claims. In the absence of a clear expression from Congress that it intended to alter existing law in this area, §502(d) should be given a similarly broad application under the Bankruptcy Code.

MicroAge, 219 B.R. at 510;[11] *see also Tidwell*, 38 B.R. at 840 n.8 (relying on decisions analyzing section 57g, concluding because section 502(d) "basically tracks section 57g," claimant was not entitled to administrative expense claim without first repaying preference).

The Second Circuit acknowledged that section 502(d) of the Bankruptcy Code was expressly derived from section 57g of the former Bankruptcy Act and that the Eighth Circuit's decision in *Weber* (among others) found 57g to be applicable to administrative expense claims. App-22a n.6. The Second Circuit's attempts to distinguish *Weber* by stating the "opinion rested its conclusion upon 'the plain, unequivocal language of the statute'—which Congress changed in section 502(d)," App-22a n.6, are addressed above at pages 9-10.

III. This Case Presents a Question of Exceptional Importance.

This Court has granted *certiorari* in cases implicating important questions going to the

[11] While the *MicroAge* court held section 502(d) applies to administrative expense claims, it ultimately concluded, based on the facts before it, that 502(d) was unavailable because the debtor failed to raise it as an affirmative defense prior to entry of the order allowing the claim. *Id.* at 512.

administration of bankruptcy law across the country.[12] This case presents just such a critical issue warranting a single, uniform rule.

Section 502(d) is a powerful tool for debtors to collect amounts they are owed in avoidance actions. It is "designed to assure an equality of distribution of the assets of the bankruptcy estate...." *Campbell v. U.S. (In re Davis)*, 889 F.2d 658, 662 (5th Cir. 1989), *cert. denied*, 495 U.S. 933 (1990). It follows that if the "objective behind §502(d) is to encourage transferees to return avoidable transfers to the estate, that objective would be best served by applying §502(d) to transferees of both administrative and prepetition claims." *MicroAge*, 291 B.R. at 512.

The Second Circuit based its decision, in part, on the need to incentivize creditors to enter into postpetition transactions with a debtor. App-20a. Purported policy considerations cannot override the

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[12] *See Reading Co. v. Brown*, 391 U.S. 471, 475 (1968) (granting *certiorari* to decide whether damages resulting from negligence of receiver are entitled to administrative expense priority because "the issue is important in the administration of the bankruptcy laws and is one of first impression in this Court"); *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 418 (1968) (granting *certiorari* to address whether court properly approved confirmation of plan because "this case presents important questions under the bankruptcy laws"); *Meyer v. Fleming*, 327 U.S. 161, 163 (1946) (granting *certiorari* to address whether shareholder entitled to prosecute derivative suit on behalf of bankrupt corporation when all causes of action had been vested in trustee because "the problem presented is an important one in bankruptcy law").

express language of a statute, however, where the language is plain and does not lead to an absurd result. *FCC*, 537 U.S. at 304. Moreover, the Second Circuit's policy consideration was based on no evidence and a dubious business rationale. The Second Circuit assumed without any record support that a vendor having liability or potential liability to return a voidable transfer to a debtor's estate would not want to do postpetition business with the debtor. Why not? The Second Circuit nowhere explains why a vendor would deprive itself of a profit on a new sale, merely because it may have liability on previous transactions. The Second Circuit also failed to confront the absurd situation its statutory interpretation created under which Debtors must pay $393,000 on behalf of administrative expense claims owed to an entity owing it $825,000 for preference liability, when the entity is in bankruptcy and unable to pay any of the $825,000.

Moreover, while encouraging third parties to do business with the debtor postpetition is a plausible goal, it is not the only policy furthered by the Bankruptcy Code. Indeed, the Second Circuit (and the decisions on which it relies) ignored the countervailing policy of assisting debtors to retrieve avoidable transfers that give entities an unfair "leg up" against other claimants.

> A creditor in receipt of an avoidable transfer obtains full payment on that portion of its claim. Allowance of its claim provides a partial distribution on account of other, unpaid debts. Taken together, the avoidable payment and the bankruptcy distribution allow such a creditor to recover a greater portion of its

> original aggregate claim than other creditors, and at their expense.

Comm. of Unsecured Creditors v. Commodity. Credit Corp. (In re KF Dairies, Inc.), 143 B.R. 734, 737 (B.A.P. 9th Cir. 1992); *see also Campbell*, 889 F.2d at 662 ("Section 502(d) is designed to assure an equality of distribution of the assets of the bankruptcy estate...."); *Hudson Feather*, 22 B.R. at 253 ("Good reasons can be found in the concern of the bankruptcy laws for the future viability of a debtor for requiring surrender of preferences, whatever the immediate economic effect, and whoever benefits therefrom."); *Mid Atl.*, 60 B.R. at 609 (Section 502(d) "preclude[s] entities which have received voidable transfers from sharing in the distribution of the assets of the estate unless and until the voidable transfer has been returned to the estate.").

A transferee who received an avoidable transfer should not be permitted to further deplete the assets of a debtor's estate by receiving payment on its claim before returning the transfer required to be turned over. *Cf. U.S. Lines (S.A.), Inc. v. U.S. (In re McLean Indus., Inc.)*, 30 F.3d 385, 388 (2d Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) ("Section 502(d) requires a court to disallow an entity's claim against the bankruptcy estate if the estate is entitled to recover property from that entity ..., but that entity has failed to first transfer this property back to the bankruptcy estate."). Moreover, an entity that received preferential transfers should not be rewarded by unjust enrichment that results in unequal treatment of all claimants against the estate. *Cf. Am. Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A.*, 280 F.2d 119, 126 (2d Cir.

1960) (court will follow "the equitable principle of preventing unjust enrichment of the debtor's estate, rather than the compensation of the creditor for the loss to him."); *accord Burlington N. R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700, 707 (9th Cir. 1988).

This logic is even more compelling when, as here, the recipient of the voidable transfer is unable to disgorge it, or administrative insolvency is at issue, as with these chapter 11 cases,[13] and is consistent with both the plain meaning of the statute and how its predecessor was applied under the Bankruptcy Act. Contrary to the statements in *CM Holdings*, 264 B.R. at 159 and *Lids*, 260 B.R. at 684, on which the court below so heavily relied, that applying section 502(d) to administrative expense claims does nothing to advance the goals of equitable distribution for similarly situated creditors where the estate is administratively solvent, section 502(d) actually effectuates the Bankruptcy Code's policy of equal distribution in cases, such as the instant one, where the Preference Defendant is unable to disgorge the preference or the estates might not be administratively solvent.[14] At oral argument in the Second Circuit, then Judge Sotomayor[15] observed:

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[13] When section 502(d) is "applied to an administrative claim against a solvent estate, the difference between a traditional setoff and the application of §502(d) may have little practical significance, as amounts due in both directions are likely to be paid at the rate of 100 cents on the dollar." *MicroAge*, 291 B.R. at 512 n.12. The result is different when the possibility of administrative insolvency exists, as in the instant case.

[14] Faced with concerns of administrative insolvency, courts have concluded that the bankruptcy policy of equal distribution (Cont'd)

> How about the reverse? Isn't there an incentive for creditors to push for preferences and then move to the favored position as administrative vendor because they can avoid the payment of the preferences and still get their administrative costs?

App-61a.

The precedent set by the Second Circuit effectively forfeits a key protection Congress provided title 11 debtors to collect voidable transfers, namely, conditioning payment of claims on claimants' prior disgorgement to the estate and runs contrary to Congress' clear intent for the estate to retain the benefit of any and all defenses available against any entity. 11 U.S.C. §558.[16] The Second Circuit reasoned,

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(Cont'd)

requires a return of a preference payment *prior* to distribution of an administrative expense. For example, in *Roberds*, 315 B.R. at 476, while the court found section 502(d) did not bar *allowance* of an administrative claim, the court did not require immediate payment on account of such claim, noting special considerations relating to section 502(d) were necessary, "specifically in the context of this currently administratively insolvent chapter 11 case." *Id.* Thus, while the court allowed the claim, it deferred payment until authorized "by separate order of the court." *Id.*

[15] Although then Judge Sotomayor was a member of the Second Circuit panel below, Her Honor did not participate in the Second Circuit's decision, which was rendered after her appointment to the Supreme Court.

[16] The Second Circuit also noted, "[a]dministrative expenses arise post-petition, and generally cannot be set off

(Cont'd)

"it generally will be more attractive for a debtor to assert section 502(d) as an affirmative defense than for the debtor to initiate suits for the return of preferential transfers, particularly when the alleged transfers are small in relation to the expected costs of the suit." App-20a n.5. The Second Circuit's reasoning in fact argues *in favor of* finding 502(d) applicable to administrative expense claims. Where it is not otherwise cost-effective for a debtor to pursue an entity for an avoidable transfer, section 502(d) helps ensure recipients of avoidable transfers do not continue to drain the debtor's estate without first reimbursing the estate for what is owed.

The argument that administrative expense claimholders would be reluctant to do business with a debtor if their claims could be disallowed if they were recipients of preferences is illogical because it is always better to sell more goods than fewer goods. Whether payment for the new goods is in cash or in satisfaction of a voidable preference, the seller is still advantaged by selling. The Seventh Circuit employed similar reasoning in *In re Kmart Corp.*, 359 F.3d 866, 873 (7th Cir. 2004), *cert. denied*, 543 U.S. 986 (2004), holding that it is seldom economically efficient to decline to do

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(Cont'd)

against prepetition claims." App-19a (citing 11 U.S.C. §553). To be sure, the fact that a creditor cannot set off its prepetition claim against the estate against a postpetition liability to the estate lends absolutely no support to the Second Circuit's notion that Debtors should have to pay an administrative expense claim to an entity that owes a preference liability it will be unable to pay.

business with a debtor postpetition notwithstanding the debtor's unwillingness or inability to satisfy prepetition claims.

It simply is unrealistic to believe trade vendors will cease extending postpetition credit to debtors in possession for fear that their applications for payment of administrative expenses will be held up indefinitely pending the resolution of attenuated or unmeritorious preference actions.

> Any creditor that has received an avoidable transfer may find itself compelled to return that transfer, whether it does business with the reorganized debtor or not. Doing business with the debtor does not increase this risk, it merely provides another source of repayment for the estate in the form of an offset against, or the disallowance of, an administrative claim if the vendor is later found to have such liability under an avoiding power theory.

MicroAge, 291 B.R. at 512. A trade creditor receiving a preferential transfer will be better off dealing with the debtor. A commercial entity able to deal profitably will be better off continuing to deal with the debtor during the pendency of the case to (in effect) reduce its preference liability than if it ceased doing business with the debtor *and* had to reimburse the estate out of pocket.

The Second Circuit's decision incentivizes inefficient behavior. The purpose of section 502(d) is to encourage creditors to return avoidable transfers to the estate.

The Second Circuit decision will not give the preference recipient any incentive to disgorge voidable payments. Instead it will only foster unjust enrichment at the expense of the debtor's other creditors. In short, there are no valid policy arguments for limiting the scope of section 502(d). Even if there were, section 502(d)'s plain meaning bars judicially imposed limitations.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED SEPTEMBER 18, 2009

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: August 29, 2008 Decided: September 18, 2009)

Docket No. 07-1362-bk

IN RE: AMES DEPARTMENT STORES, INC.,

Debtor,

ASM CAPITAL, LP,

Appellant,

–v.–

AMES DEPARTMENT STORES, INC.,

Debtor-Appellee.

Before: CALABRESI and B.D. PARKER,
*Circuit Judges.**

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* The Honorable Sonia Sotomayor, originally a member of the panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(d); Local Rule 0.14(2); *United States v. Desimone*, 140 F.3d 457 (2d Cir.1998).

Appendix A

Per Curiam:

This appeal raises the question of whether section 502(d) of the Bankruptcy Code, which bars allowance of certain claims filed against the debtor's estate by alleged recipients of preferential transfers, also bars allowance to such a claimant of postpetition administrative expenses pursuant to section 503(b) of the Bankruptcy Code. We conclude that it does not, and consequently we vacate the order of the district court.

I. BACKGROUND

A. Facts

The debtor-appellee Ames Department Stores, Inc. was a large chain of department stores (collectively, "Ames"), that commenced a voluntary case under chapter 11 of the Bankruptcy Code on August 20, 2001 by filing a petition in the United States Bankruptcy Court for the Southern District of New York (Gerber, J.). A year later, in August 2002, Ames's board of directors determined that the value of the bankruptcy estate could be best maximized through an orderly dissolution of Ames's affairs in chapter 11 and obtained an order from the bankruptcy court allowing Ames to close its businesses and sell its assets.

Appellant ASM Capital, LP ("ASM") is an investor in distressed debt. In 2002 and 2003, ASM acquired claims against Ames's bankruptcy estate from various of Ames's creditors, including two claims held by G & A

Sales, Inc. ("G & A"), a supplier to Ames: an administrative expense claim of $360,117.65, and a reclamation claim of $33,292.50 (collectively, the "G & A Claims").[1] Administrative expenses are the "actual, necessary costs and expenses of preserving the estate," such as rent, wages, insurance, utilities, and trade credit, that arise during the pendency of the debtor's bankruptcy case. *See* 11 U.S.C. § 503(b)(1)(A). A reclamation claim provides a supplier with a right to reclaim goods that a customer received on credit while insolvent in the period just before commencement of bankruptcy proceedings. *See* 11 U.S.C. § 546(c); *cf.* U.C.C. § 2-702. At the time of Ames's bankruptcy filing, a court could deny reclamation to a seller with a section 546(c) reclamation claim by instead granting the seller's claim priority as a section 503(b) claim, or by securing the claim with a lien.[2]

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1. ASM also acquired claims from Delaware Ribbon Manufacturers, Commonwealth Wholesale Corp., The Washington Post, and Williamson-Dickie Mfg. Co. Those claims eventually were allowed by the bankruptcy court and are not at issue in this appeal.

2. Prior to 2005, section 546(c) provided that:

> (c) Except as provided in subsection (d) of this section, the rights and powers of a trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but—

(Cont'd)

(Cont'd)

> (1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods—
>
> > (A) before 10 days after receipt of such goods by the debtor; or
> >
> > (B) if such 10-day period expires after the commencement of the case, before 20 days after receipt of such goods by the debtor; and
>
> (2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court—
>
> > (A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title; or
> >
> > (B) secures such claim by a lien.

11 U.S.C. § 546(c) (1998).

In 2005, Congress amended the Bankruptcy Code to include a new section 503(b)(9), which allowed a seller of goods to assert an administrative expense for "the value of any goods received by the debtor within 20 days before" the commencement of bankruptcy proceedings, and amended section 546(c)(2) to provide that "[i]f a seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9)." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109-8, § 1227, 119 Stat. 23, 199-200. Neither party has suggested that section 503(b)(9) has any relevance to this appeal, and we do not specifically address its interaction with section 502(d).

Appendix A

Ames had suspended payment on its administrative expense claims in 2002 when it abandoned its efforts to reorganize and decided to liquidate. Sometime thereafter, Ames filed adversarial proceedings ("Preference Actions") against several of its former suppliers and other creditors, including G & A, to recover alleged preferential transfers. In 2004, while Preference Actions were still pending, Ames began making interim distributions to holders of administrative expense claims, but refused to make distributions to holders who (a) were defendants in a Preference Action; (b) acquired their claims from a defendant in a Preference Action; or (c) would not agree to sign a release form fixing the amount of their administrative expenses. Ames refused to make interim distributions to ASM on the ground that ASM's predecessors in interest were defendants in Preference Actions.

ASM moved the bankruptcy court on April 6, 2005 for an order allowing its administrative expenses in the amount of $964,587 and compelling Ames to pay that amount within fifteen days of entry of the order or when Ames paid other administrative expense claim holders. Ames opposed the motion on the ground that section 502(d) of the Bankruptcy Code barred payments on ASM's claims until the return of any preferential transfers received by the creditors with whom the claims had originated, notwithstanding that ASM had not itself received any preferential transfers and was not a defendant in any Preference Action.

Appendix A

Before the bankruptcy court ruled on the motion in December 2005, the Preference Actions against nearly all of ASM's predecessors-in-interest were resolved, so that only the action against G & A remained outstanding. The bankruptcy court allowed ASM's claims that had originated with creditors who no longer were defending a Preference Action, but ruled that section 502(d) of the Bankruptcy Code barred allowance of the claims ASM had acquired from G & A until the Preference Action against G & A was resolved and G & A had paid or disgorged the amount, if any, for which G & A was liable to Ames.

ASM appealed the 2005 Order to the United States District Court for the Southern District of New York (Kaplan, J.), but the district court dismissed the appeal for lack of finality and failure to meet the requirements for interlocutory appeals. ASM tried again in September 2006, by moving the bankruptcy court to enter a supplemental order (i) disallowing ASM's administrative expenses pursuant to section 502(d) of the Bankruptcy Code; (ii) directing immediate payment of its reclamation claim; and (iii) declaring that the supplemental order was final and appealable. The bankruptcy court denied that motion in an order issued on December 1, 2006 (the "2006 Order"), but did make supplemental factual findings relating to finality.

In those findings, the bankruptcy court explained that it had intended its 2005 Order to mean that the G & A Claims held by ASM "would be temporarily disallowed until each of two things had happened: that

(1) the [Preference Action] against G & A was 'resolved'; and (2) G & A had paid the amount (or turned over any property), if any, that had been judicially determined to be payable to the Ames estate." Since then, the court found, the Preference Action had finally been resolved by entry of a default judgment against G & A on June 19, 2006 in the amount of $825,138. But the bankruptcy court's disallowance pursuant to section 502(d) remained in effect because the repayment requirement "remains unsatisfied—as the judgment has not been collected upon." The court further found that the disallowance "will likely be permanent" because G & A had filed its own petition for Chapter 11 reorganization, suspended its business, and had transferred all of its assets to a secured creditor, thereby making it "highly unlikely" Ames would ever collect on the judgment.

ASM timely appealed the bankruptcy court's 2006 Order to the district court. This time, with the benefit of the bankruptcy court's additional findings, the district court concluded that, "while the disallowance of ASM's claim under section 502(d) of the code nominally is temporary, in practical effect it is final."[3] The district court then affirmed the bankruptcy court's order on the merits, stating that it was "in complete agreement" with the bankruptcy court that section 502(d) of the Bankruptcy Code applied to administrative expense claims. ASM moved the district court to certify an

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3. The district court also ruled in the alternative that, if the court of appeals decided the finality issue differently, it would grant ASM leave to file an interlocutory appeal.

interlocutory appeal of its order, and simultaneously filed a petition with this Court for permission to appeal from the district court's order pursuant to Federal Rule of Appellate Procedure 5 and 28 U.S.C. § 1292(b). The district court denied ASM's certification motion without prejudice to renewal if this Court concluded that the order appealed from was not final. ASM then filed a Notice of Appeal to this Court. On May 8, 2007, a panel of this Court denied ASM's petition for permission to appeal, and directed the parties to address in their briefs whether the order appealed from is a final order.

II. DISCUSSION

A. Standard of Review

We exercise plenary review over the orders of a district court functioning in its capacity as an appellate court in a bankruptcy case. Thus, we independently review the factual findings and legal conclusions of the bankruptcy court. *Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir.1994). The bankruptcy court's legal conclusions are evaluated *de novo*; its findings of fact are subject to a clearly erroneous standard. *Id.*; *see also* Fed. R. Bankr.P. 8013. We will determine that a finding is "clearly erroneous" when we are left with the definite and firm conviction that a mistake has been made. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

B. Jurisdiction

We have jurisdiction pursuant to 28 U.S.C. § 158(d) to hear this appeal from a decision of the district court exercising its bankruptcy appellate jurisdiction because that decision and the underlying bankruptcy court decision both are final orders within the meaning of 28 U.S.C. § 158. *See Shimer v. Fugazy (In re Fugazy Express, Inc.)*, 982 F.2d 769, 775 (2d Cir.1992) ("The district court's own decision of an appeal from the bankruptcy court is not a final decision for purposes of appeal to the court of appeals unless the order of the bankruptcy court was final.").

It is true, as Ames argues, that the bankruptcy court's 2006 Order formally prevents ASM from pursuing its claim for administrative expenses only temporarily, until G & A Sales has satisfied the default judgment it owes to Ames. But "[i]t is sometimes appropriate that the requirement of finality be given a practical rather than a technical construction," *In re Am. Preferred Prescription, Inc.*, 255 F.3d 87, 93 (2d Cir.2001) (quotation marks omitted), and the practical effect of the bankruptcy court's order here will be to permanently bar allowance of ASM's claim because it is not likely that Ames will ever recover its judgment against G & A. As Ames acknowledges, G & A filed for chapter 11 reorganization in the United States Bankruptcy Court for the Central District of California on May 6, 2003, and its case was closed (without a discharge) on May 31, 2005. The bankruptcy court in this case concluded that "there [was] no reasonable

likelihood" that Ames would ever collect its judgment against G & A Sales and the district court agreed, finding that "while the disallowance of ASM's claim under section 502(d) of the code nominally is temporary, in practical effect it is final because the condition . . . simply is not likely ever to be satisfied." Although Ames says that it still hopes to collect its judgment against G & A and has hired a firm to pursue that collection, it has not identified any assets from which recovery might be had. Moreover, Ames's lackadaisical efforts in the Preference Action against G & A, which sat for three years without appearance by G & A before Ames moved for entry of a default judgment, counsel against deferring consideration of this appeal. Accordingly, we conclude that the 2005 Order is a final order for purposes of this appeal.

C. The Scope of Section 502(d)

Whether section 502(d) of the Bankruptcy Code bars the allowance of administrative expense claims under section 503 is a question of first impression in this Circuit. The district court and bankruptcy court both held that section 502(d), which disallows bankruptcy claims of certain entities until they have returned any voidable preferential payments or transfers from the debtor's estate, applies to allowance of administrative expenses under section 503. Both courts therefore agreed that section 502(d) bars allowance of ASM's G & A claims until G & A satisfies the default judgment that Ames obtained against it in the Preference Action. We disagree.

Appendix A

1. Statutory Language

"Statutory interpretation always begins with the plain language of the statute," *Universal Church v. Geltzer*, 463 F.3d 218, 223 (2d Cir.2006), which we consider in "the specific context in which that language is used, and the broader context of the statute as a whole," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). We turn to the legislative history only when "the plain statutory language is ambiguous or would lead to an absurd result." *Universal Church*, 463 F.3d at 223.

Accordingly, we begin with the language of section 502(d), which provides in full:

> Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

11 U.S.C. § 502(d).

The courts below first determined that requests for payment of administrative expenses under section 503

are "claims" within the meaning of the Bankruptcy Code, which in section 101(5) defines that term to include any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). The courts then held that, because section 502(d) explicitly encompasses "*any claim* of any entity from which property is recoverable," 11 U.S.C. § 502(d) (emphasis added), it applies to administrative expenses.

Both lower courts endorsed the reasoning of the United States Bankruptcy Appellate Panel of the Ninth Circuit in *MicroAge, Inc. v. Viewsonic Corp. (In re MicroAge, Inc.)*, 291 B.R. 503 (9th Cir. BAP 2002). *See also Movitz v. Baker (In re Triple Star Welding, Inc.)*, 324 B.R. 778, 794 (9th Cir. BAP 2005) (applying *MicroAge*), *abrogated on other grounds by Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832 (9th Cir.2008). The eponymous debtor in *MicroAge* had negotiated a settlement with a seller that had asserted a reclamation claim for goods alleged to be worth $947,886. *MicroAge*, 291 B.R. at 504-05. The order approving that settlement granted the seller an "allowed reclamation administrative priority claim" for $574,025. *Id.* But then MicroAge failed to pay the seller's claim in a timely manner, and the seller brought a motion to compel payment. MicroAge opposed that motion by filing an adversary complaint alleging the seller had received $2,329,701 in preferential transfers, which it sought to avoid, and then arguing that section 502(d) precluded allowance of the administrative claim until the

preference action was resolved. *Id.* at 505. The United States Bankruptcy Court for the District of Arizona rejected that argument and ordered MicroAge to pay the seller's administrative claim. holding that section 502(d) did not apply to administrative claims under section 503. On appeal, the Ninth Circuit Bankruptcy Appellate Panel disagreed and held that section 502(d) generally was a valid defense to allowance of administrative claims, but nevertheless affirmed on the ground that it was too late for section 502(d) to be applied to the seller's claim because the claim already had been allowed. *Id.* at 512-13.

In determining the scope of section 502(d), the bankruptcy appellate panel first noted that section 502(d) "by its terms applies to 'any claim' of an entity that received an avoidable transfer, and the definition of a 'claim' in § 101(5) is sufficiently broad to include requests for payment of expenses of administration." *Id.* at 508. The language of other provisions in the Bankruptcy Code, according to the bankruptcy appellate panel, further suggests that "Congress viewed expenses of administration as merely one specialized type of claim," and that Congress thus intended such expenses to be subject to section 502(d). *Id. (citing* 11 U.S.C. § 346(e) (referring to a "claim allowed under section 502(f) or 503 of this title"), and 11 U.S.C. § 365(n)(1)(B)(i) (referring to "any claim allowable under section 503(b) of this title")). Similarly, the explicit exclusion of administrative claims from some sections but not from section 502(d) suggested to the bankruptcy appellate panel that the claims are intended to be subject to

section 502(d). *Id.* (*citing* 11 U.S.C. § 348(d) (excepting claims allowable under § 503(b)), 11 U.S.C. § 752(a) (excepting claims of the kind specified in § 507(a)(1)), 11 U.S.C. § 1123(a)(1) (same) and 11 U.S.C. § 1326(b)(1) (same)).

As other courts have noted, however, other sections of the Bankruptcy Code distinguish between "claims" and requests for administrative expenses under section 503(b). *See, e.g., In re Plastech Engineered Products, Inc.*, 394 B.R. 147, 157-58 (Bankr.E.D.Mich.2008) (citing cases holding that section 502(d) uses "claim" to refer only to prepetition claims and not to requests for administrative expenses); *Beasley Forest Products, Inc. v. Durango Ga. Paper Co.* (*In re Durango Ga. Paper Co.)*, 297 B.R. 326, 329-31 (Bankr.S.D.Ga.2003) (discussing instances where "expenses" are distinguished from "claims" in subchapter including sections 502 and 503); *In re Lids Corp.*, 260 B.R. 680, 683-84 (Bankr.D.Del.2001) (noting sections of code that distinguish between prepetition, postpetition, and administrative claims); *Camelot Music, Inc. v. MHW Adver. & Public Relations, Inc. (In re CM Holdings, Inc.)*, 264 B.R. 141, 159 (Bankr.D.Del.2000) (same). For instance, section 507(a) refers to "expenses *and* claims," and establishes a separate priority for "administrative expenses" than for "claims." 11 U.S.C. § 507(a) (emphasis added). Section 101(10) defines "creditor" in terms that include only holders of prepetition claims (and certain postpetition claims deemed to be prepetition claims) and not holders of postpetition claims for administrative expenses under section 503. 11 U.S.C. § 101(10). And

section 348(d) similarly applies to any postpetition claim "other than a claim specified in section 503(b)." 11 U.S.C. § 348(d). As the United States Bankruptcy Court for the District of Delaware concluded in *CM Holdings*, the express exclusion of administrative expense claims from section 348(d), and the exclusion of administrative claim holders from the definition of "creditor," lend "support to the view that administrative expense claims are claims that are entitled to distinct treatment separate and apart from pre-petition, or deemed pre-petition, creditor claims." *CM Holdings*, 264 B.R. at 158. Thus, the general definition of "claim" in section 101(5) does not by itself resolve the scope of section 502(d).

The structure and context of section 502(d) suggests that Congress intended it to differentiate between claims and administrative expenses, and not to apply to the latter. Section 502, in conjunction with section 501, provides a procedure for the allowance of claims that is entirely separate from the procedure for allowance of administrative expenses under section 503. Section 501, which is titled "Filing of proofs of claims or interests," provides that a creditor may file a proof of claim. 11 U.S.C. § 501(a). Although the definition of "claim" in section 101(5) does not distinguish between prepetition and postpetition rights to payment, the claims addressed by section 501 are only prepetition claims and certain postpetition claims that are treated as prepetition claims. *See* 11 U.S.C. § 501(d) (providing that postpetition claims specified in sections 502(e)(2), (f), (g), (h) or (i) may be filed under section 501 "the same as if such claim were a claim against the debtor and had

arisen before the date of the filing of the petition"); *see also* 11 U.S.C. § 101(10) (defining "creditor" as a holder of a prepetition claim or a deemed prepetition claim). Section 502, which is titled "Allowance of claims or interests," governs the allowance of claims for which proof is filed under section 501. Under section 502(a), such claims are deemed allowed when filed unless a party in interest objects, in which case section 502(b) requires the court to provide notice and a hearing and then determine the allowable amount of the claim. Because claims for administrative expenses may not be filed under section 501,[4] they are not subject to sections 502(a) and (b).

Both the filing of requests for payment of administrative expenses and the allowance thereof are governed by section 503, which is titled "Allowance of administrative expenses." The procedure is independent from the procedure for filing and allowance of prepetition claims under sections 501 and 502, and differs in significant respects. *See In re Durango Ga. Paper Co.*, 297 B.R. at 329 (observing that section 503 differs from section 502 because it "needs no complement" and uses different terminology). Whereas

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4. For instance, the official form for filing a proof of claim pursuant to section 501 explicitly states "This form should not be used 'to make' a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503." *See* Official Bankruptcy Form B 10 (Dec.2007) *available at* www.uscourts.gov/rulesBK_Forms_Pending_2008/B_010_1208v4.pdf (last visited September 9, 2009).

section 501 allows only "creditors" (i.e. holders of prepetition claims) to file proofs of claims, section 503(a) provides that any "entity" may file a request for payment of administrative expenses. Similarly, while section 502 requires notice and a hearing for a prepetition claim only if there is an objection to the claim, section 503(b) requires notice and a hearing on all requests for administrative expenses, regardless of whether any objection has been made. Section 503(b) also enumerates the types of administrative expenses allowable under section 503 and excludes "claims allowed under section 502(f)," i.e., deemed prepetition claims in an involuntary case that are subject to sections 501 and 502. *Id.* Thus, with respect to the allowance of claims, sections 502 and 503 are separate and independent.

The language of section 502(d) suggests that it applies only in the context of section 502, and not to claims addressed by section 503. Section 502(d) provides that, "[n]otwithstanding subsections (a) and (b) of this section," the court shall disallow any claim of an entity from whom property is recoverable under certain avoidance provisions of the Bankruptcy Code, unless the entity has returned the recoverable property. The plain language thus introduces section 502(d) as an exception to the automatic allowance of proofs of claims under sections 502(a) and (b), and suggests that the subsection's scope is limited to that process and does not extend to claims allowable under section 503. That suggestion is reinforced by the absence from section 502(d) of any reference to section 503. "To construe § 502(d)'s disallowance as applicable to expenses

allowable under § 503—a section with its own scope, purpose, and conditions—is to expand the scope of § 502(d)'s disallowance beyond its plain meaning." *In re Durango Ga. Paper Co.*, 297 B.R. at 330.

Furthermore, sections 502(e)(2), (f), (g), (h) and (i) explicitly bring certain postpetition claims within the scope of section 502 by providing, in each case, that the claims "shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) . . . *the same as if such claim had become fixed before the date of the filing of the petition.*" *E.g.*, 11 U.S.C. § 502(e)(2) (emphasis added). The express invocation of section 502(d) suggests that the section did not already apply to such claims before they were brought within section 502's reach, and that it does not apply to postpetition claims remaining outside section 502, such as the requests for administrative expenses addressed by section 503(b). *See In re Lids Corp.*, 260 B.R. at 683-84 ("Congress'[s] inclusion of five post-petition claims to which section 502(d) expressly applies . . . demonstrates that section 502(d) does not apply to other post-petition claims."); *In re CM Holdings, Inc.*, 264 B.R. at 158 & n. 8 ("The express reference to, and treatment of, these other types of postpetition claims within the purview of § 502(d) suggests by negative implication that the drafters did not intend that administrative expense claims be subject to the set off provision of § 502(d)."). The clarifying final phrase—"*the same as if such claim had become fixed before the date of the filing of the petition*"—is further evidence that section 502(d), like sections 502(a) and (b), ordinarily applies only to prepetition claims.

Finally, the mandatory terms in which section 503(b) is drafted, requiring courts to allow requests for administrative expenses, suggest a conflict with section 502(d)'s equally mandatory disallowance of claims. Section 502(d) avoids a similar conflict with sections 502(a) and (b) by expressly providing that it applies "[n]otwithstanding subsections (a) and (b) of this section." Ames contends that there is no conflict with section 503(b) because that section requires notice and a hearing, at which the debtor could invoke section 502(d) as an affirmative defense. But section 502(b) also requires notice and a hearing, and section 502(d) expressly provides that it takes precedence over that section while saying nothing about section 503(b).

2. Statutory Context

Moreover, the context of these provisions in the Bankruptcy Code counsels in favor of holding section 502(d) inapplicable to administrative expenses under section 503(b).

First, the Bankruptcy Code establishes a clear division between an entity in its pre- and post-petition states. Administrative expenses arise post-petition, and generally cannot be set off against prepetition claims. *Cf.* 11 U.S.C. § 553 (allowing offset of mutual prepetition debts between creditor and debtor). Second, and more importantly, the Bankruptcy Code gives a higher priority to requests for administrative expenses than to prepetition claims in order to encourage third parties to supply goods and services on credit to the estate, to

the benefit of all of the estate's creditors. *See* 11 U.S.C. § 506(c). That intent would be frustrated by allowing a debtor automatically to forestall or avoid payment of administrative expenses by alleging that the vendor had been the recipient of a preferential transfer.[5] As the United States Bankruptcy Court for the District of Delaware observed in *Lids*, *"[i]f* trade vendors felt that a preference could be used to prevent the payment of their administrative claims, they would be extremely reluctant to extend post-petition credit to a chapter 11 debtor." 260 B.R. at 684.

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5. The court in *In re MicroAge* discounted this policy concern because "[a]ny creditor that has received an avoidable transfer may find itself compelled to return that transfer, whether it does business with the reorganized debtor or not." 291 B.R. at 512. But doing business with the reorganized debtor and filing a request for payment of administrative expenses might have other consequences, such as waiving the vendor's right to a jury trial in any preference action initiated by the debtor. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58-59 & n. 14, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) (holding defendant to a preference action has a right to a jury trial pursuant to the Seventh Amendment of the United States Constitution, but that right can be waived by filing a claim in the bankruptcy proceedings); *In re CBI Holding Co.*, 529 F.3d 432, 438 (2d Cir.2008) (holding claimant waived right to jury trial on claims brought against it on behalf of bankruptcy estate "when it submitted its Proof of Claim against the estate and subjected itself to the equitable powers of the bankruptcy court"). Moreover, it generally will be more attractive for a debtor to assert section 502(d) as an affirmative defense than for the debtor to initiate suits for the return of preferential transfers, particularly when the alleged transfers are small in relation to the expected costs of the suit.

These policies confirm our conclusion that Congress did not intend section 502(d) to apply to administrative expenses under section 503(b).[6]

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6. Contrary to Ames's position, we are not persuaded that the legislative history to section 502(d) indicates a Congressional intent to apply that section to administrative expenses pursuant to section 503, and we find the legislative history at most to be inconclusive.

The Congressional reports issued in connection with the enactment of the Bankruptcy Reform Act of 1978 state only that section 502(d) was "derived from present law," and "requires disallowance of a claim of a transferee of a voidable transfer *in toto* if the transferee has not paid the amount or turned over the property received as required under the sections under which the transferee's liability arises." S.Rep. No. 95-989, at 65, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5851; H.R.Rep. No. 95-595, at 354, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6310. Neither report discusses whether section 502(d) was meant to apply to administrative expenses pursuant to section 503.

Ames contends that the law from which section 502(d) was derived, section 57g of the Bankruptcy Act, Ch. 541, § 57g, 30 Stat. 560 (repealed 1978) (formerly codified at 11 U.S.C. § 93g) ("The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this title, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances."), was understood to apply to requests for administrative expenses, and that the legislative history to section 502(d) therefore should be understood to indicate that Congress intended that section also to apply to administrative expenses. But the Supreme Court stated as late as 1966 that "[t]he exact

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III. CONCLUSION

Pursuant to the above analysis of the relevant statutory language, both in its specific context and in the "broader context of the statute as a whole," *Robinson*, 519 U.S. at 341, 117 S.Ct. 843, we hold that section 502(d) does not apply to administrative expenses

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reach of s. 57, sub. g is not entirely settled," *Katchen v. Landy*, 382 U.S. 323, 330 n. 5, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966), and the reach of the section was not settled any further between that decision and the adoption of the Bankruptcy Code in 1978.

During that period, the only Court of Appeals to address the question was the United States Court of Appeals for the Eighth Circuit, which, in *Weber v. Mickelson (In re Colonial Servs. Co.)*, 480 F.2d 747 (8th Cir.1973), held that section 57g of the Bankruptcy Act extended to administrative expenses. The *Colonial Services* opinion rested its conclusion upon "the plain, unequivocal language of the statute"—which Congress changed in section 502(d)—and the 1932 decision of the United States District Court for the Southern District of New York in *Irving Trust Co. v. Frimitt*, 1 F.Supp. 16, 17 (S.D.N.Y.1932). *Colonial Services*, 480 F.2d at 749. But there is no indication that the applicability of section 57g to the creditors' claims was a disputed issue in *Irving Trust*, and the court's statement that each of the creditors had filed a "proof of claim" in the bankruptcy proceeding, presumably pursuant to section 57 of the Act, suggests that it was not. *Irving Trust*, 1 F.Supp. at 17. Accordingly, *Colonial Services* is weak authority for the proposition that Congress understood section 57g of the Bankruptcy Act to apply to administrative expenses and intended new section 502(d) of the Bankruptcy Code to apply to such requests as well.

under section 503(b). In view of this conclusion, we find it unnecessary to reach ASM's alternative argument that, even if section 502(d) did extend to administrative expenses under section 503(b), it could be invoked only against the recipient of the alleged preferential transfer and not against a subsequent holder of a claim that originated with the alleged transferee.

We therefore VACATE the decision of the district court and REMAND with instructions to remand to the bankruptcy court for further proceedings consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED MARCH 2, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

07 Civ. 0219 (LAK)
(Chapter 11 Case No. 01-42217 (REG))

In re

AMES DEPARTMENT STORES, INC., et al.,

Debtors.

ASM CAPITAL, L.P.,

Appellant,

-against-

AMES DEPARTMENT STORES, INC., et al.,

Appellees.

ORDER

LEWIS A. KAPLAN, *District Judge.*

Appellant ASM Capital, L.P. ("ASM"), a trader in claims, purchased approximately $390,000 in administrative expense claims against the debtors from

G&A Sales. G&A Sales became the subject of an avoidance action by the debtors that resulted in an unsatisfied default judgment against G&A Sales in an amount exceeding $800,000. Bankruptcy Judge Gerber disallowed the administrative expense claim acquired from G&A Sales pending payment of the judgment, concluding that Section 502(d) of the Code, 11 U.S.C. § 502(d), applies to the payment of administrative expenses under Section 503. Following an abortive initial appeal and supplemental findings in the Bankruptcy Court, ASM appealed, arguing that the Bankruptcy Court misconstrued Section 502(d) and therefore erred in disallowing the G&A Sales claim. Following the denial of the debtors' motion to dismiss the appeal as lacking in finality and my alternative grant of leave to appeal, the appeal now is before me for disposition on the merits.

Having had the benefit of the parties' briefs and carefully reviewed the bench decision of Judge Gerber containing his original ruling as well as his decision and order containing his supplemental findings, I find myself in complete agreement with Judge Gerber and the decision in *In re MicroAge, Inc.*, 291 B.R. 503 (9th Cir. BAP 2002). Accordingly, the order, insofar as it is appealed from, is affirmed.

SO ORDERED.

Dated: March 2, 2007

s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

APPENDIX C — DECISION AND ORDER ON MOTION FOR ENTRY OF SUPPLEMENTAL ORDER DENYING REQUEST FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM, AND COMPELLING PAYMENT OF RECLAMATION CLAIM OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 1, 2006

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Case
No. 01-42217 (REG)
Jointly Administered

In re

AMES DEPARTMENT STORES, INC., *et al.*,

Debtors.

DECISION AND ORDER ON MOTION FOR ENTRY OF SUPPLEMENTAL ORDER DENYING REQUEST FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM, AND COMPELLING PAYMENT OF RECLAMATION CLAIM

BEFORE: ROBERT E. GERBER
UNITED STATES BANKRUPTCY
JUDGE

Appendix C

In this contested matter in the jointly administered chapter 11 cases of Debtors Ames Department Stores and its subsidiaries ("Ames"), movant ASM Capital, LP ("ASM"), a trader in claims, asks this Court to enter a "supplemental order" to facilitate its efforts to prosecute an appeal from an earlier order of this Court that had denied ASM's request for payment of two administrative expense claims ASM had acquired. ASM's motion principally involves the issue as to the extent to which the bankruptcy court should be issuing supplemental orders or findings to alter the terrain upon which higher courts decide whether a bankruptcy court order is sufficiently final to qualify for appellate review. For reasons set forth below, this Court concludes that its role in influencing the appellate courts' determinations in that regard is very limited. The motion is granted to the extent of making supplemental factual findings for the use of the higher courts, if and to the extent they find them significant or helpful, and is otherwise denied.

The following are the Court's Findings of Fact, Conclusions of Law, and (to the extent applicable) bases for the Court's exercise of discretion in connection with this determination.

Findings of Fact

The facts underlying this determination were in all material respects undisputed, and there accordingly was no need to hold an evidentiary hearing.

Appendix C

ASM is an investor in distressed debt. It acquired the two claims in question on this motion—an administrative expense claim in the amount of approximately $360,000 and a reclamation administrative expense claim in the amount of approximately $33,000—from G&A Sales, Inc. ("G&A"), a pre- and post-petition vendor to the Debtors.[1] But G&A had been the recipient of over $800,000 in allegedly voidable preferences, and Ames filed suit against G&A to recover them. And G&A had neither prevailed in that suit nor had it turned over the preferential payments it had received.

Ames objected to the G&A/ASM claims,[2] in reliance on section 502(d) of the Code. Section 502(d) provides, in substance, as relevant here, that the court "shall disallow any claim of any entity" from which "property is recoverable" under the Code's avoidance provisions[3]—which include sections 547 and 550,

1. The amount ASM paid for the claims is not in the record, and was and is immaterial for the purposes of the Initial Order and this motion. Under fundamental principles, the distributions to claims traders who choose to invest in claims during the course of a bankruptcy, like the distributions to creditors who were unpaid at the outset of the bankruptcy case, are based on the face amount of the claims and not the amounts paid to acquire them.

2. Ames also objected to other ASM claims, as to which this Court ruled in favor of ASM. *See* note 6 below.

3. With a great deal of its much more extensive language deleted, for readability, to omit inapplicable matter, section 502(d) provides, in relevant part:

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providing for the avoidance and recovery of preferences. But ASM and Ames differed on whether section 502(d) applies (as ASM argued) solely to prepetition claims, on the one hand, or (as Ames argued) to all claims, on the other. ASM had some caselaw on its side, but Ames relied on other (including more recent) caselaw, the notable differences in the Code's definitions of "claim" and "creditor," the law under the former Bankruptcy Act, and, most importantly, the plain meaning of section 502(d).

After hearing an argument on the objection, the Court agreed with Ames. With a decision dictated into the record,[4] the Court ruled that section 502(d) applies

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> [T]he court shall disallow any claim of any entity from which property is recoverable under section . . . 550 . . . of this title, unless such entity . . . has paid the amount, or turned over any such property, for which such entity . . . is liable under section . . . 550 . . . of this title.

4. The Court stated at the outset:

> Gentlemen, this being a matter of first impression in this District and Circuit, under normal circumstances I would prefer to write on it, and I may still do so. However, I think I have a responsibility to you all to issue you a decision on a real time basis, and accordingly, I'm going to give you a decision now and the outline of the reasons for it—reserving the right, albeit arguably an unrealistic one, to write more expansively if other matters that are in the pipeline can be addressed and then give me the opportunity to do so.

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to *all* claims, pre- and post-petition, and not just to pre-petition claims. And then, because (as an aspect of this Court's ruling that ASM's counsel understandably did not dispute)[5] ASM acquired its claims subject to the

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Hrg. Tr. at 29 (transcription errors corrected). In a disservice to the district court and this Court, neither side in this controversy complied with the requirements of this Court's case management orders requiring measures to provide corrected transcripts for use on appeal. *See, e.g.*, Case Management Order #1, dated Oct. 18, 2002 ¶ 25. The portion of the hearing transcript with the Court's decision, as corrected, and with citations to caselaw referred to in shorthand, is attached to this decision.

5. *See Enron Corp. v. Ave. Special Situations Fund II, LP (In re Enron Corp.)*, 340 B.R. 180, 202 (Bankr. S.D.N.Y. 2006) ("participants in the claims-transfer market are aware of, or should be aware of, the risks and uncertainties inherent in the purchase of claims against the debtors, including the possibility of claims being temporarily disallowed under section 502(d) unless and until their predecessors turn over the avoidance transfers."), *leave to appeal granted*, 2006 WL 2548592 (S.D.N.Y. Sept. 5, 2006).

See also Enron Corp. v. Ave. Special Situations Fund II, LP (In re Enron Corp.), 333 B.R. 205, 229 (Bankr. S.D.N.Y. 2005) ("As noted by the Supreme Court in *Fidelity Mut. Life Ins. [Co. v. Clark*, 203 U.S. 64 (1906)], the transferees are subject to the equities existing at the time of the transfer. . . . The purchase of a claim, itself, evidences the transferee's willingness to assume the risks attendant to a bankruptcy proceeding. . . . The risk that full recovery may not be available is a risk factor that must be assessed by a purchaser."); *id.* at n.12 ("the risk of buying claims in a bankruptcy proceeding has been identified in the

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same defenses that would be applicable to its claims assignors (and with no greater rights than its claim assignors had), ASM's administrative expense claims had to be disallowed just as they would have been if the claims had not been acquired, and if they had been prosecuted by G&A, their original holder.[6]

(Cont'd)

distressed debt industry for at least a decade. 'As a general legal principle, an investor who purchases a distressed claim enjoys the same rights and disabilities as the original claimholder.'") (quoting Stuart C. Gilson, *Investing in Distressed Situations: A Market Survey*, FINANCIAL ANALYSTS J. 8, 10 (November-December 1995)) (internal quotation marks omitted).

In this Court's view, the holdings in the *Enron* cases are plainly correct, as, *inter alia*, the plain language of the Code speaks of the claims themselves, and not the holders of claims. And the *Enron* cases appropriately implement bankruptcy policy (such as fairness to other creditors and avoiding the laundering of claims), as well as correctly applying what the Code says. If investors in claims are unhappy with the consequences of the statutory environment in which they choose to invest, they can deal with it by engaging in appropriate due diligence or securing indemnification when they acquire their claims, or, if they are so advised, by persuading Congress to make changes in the Bankruptcy Code. To the extent that the implementation of bankruptcy policy by adherence to the Bankruptcy Code conflicts with other policies or goals that investors in claims might wish to advance, that is a matter for Congress to address.

6. Consistent with that analysis, and in another aspect of the Court's ruling, which ASM understandably did not dispute (but which Ames did not appeal either), this Court ruled that

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Thus, by its order dated December 5, 2005 (the "Initial Order"),[7] in accordance with that ruling, the Court provisionally disallowed the G&A claims then held by ASM, pending the estate's receipt of the property that was recoverable. The Initial Order provided, in relevant part:

> ORDERED that, pursuant to section 502(d) of the Bankruptcy Code, the claims of G&A Sales against the Debtors held by ASM shall be disallowed until the Avoidance Action against G&A Sales is resolved in the Debtors' chapter 11 cases and G&A Sales has paid the amount, or turned over any such property, for which G&A Sales is liable to the Debtors.[8]

It went on to provide that "notwithstanding" that paragraph, "nothing contained herein shall be deemed to be a determination of the merits of the claims of G&A Sales against the Debtors held by ASM."[9]

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the section 502(d) analysis follows claims, and not the holders of claims, and thus that ASM's "dirty" claims did not impair ASM's right to recover on other, separate, "clean" claims that ASM had also acquired. *See* Hrg. Tr. at 30.

7. Order Granting in Part and Denying in Part Request of ASM Capital, LP for Allowance and Payment of Administrative Expense Claims (Dec. 12, 2005), Docket #2899.

8. Initial Order at 2.

9. *Id.* at 3.

Appendix C

ASM sought to appeal from the portions of the Initial Order that were adverse to it. But in a written opinion and order (the "District Court Decision"),[10] Judge Kaplan of the district court dismissed the appeal, for lack of the requisite finality and for failure to meet the standards for consideration of an interlocutory appeal. He found that the Initial Order was "interlocutory on its face," as it did not definitively disallow ASM's claims."[11] And he then considered facts which were argued, as a practical matter, to make the Initial order effectively final:

> ASM nevertheless asserts that the order is final given the factual context—it contends that G&A no longer is in existence and therefore cannot pay or turn over any property for which it otherwise might have been liable to the Debtors. But this argument is insufficient to carry the day, even given the fact that the finality requirement on occasion is construed with flexibility.[12]

He went on to observe:

> To begin with, even if there were adequate basis for concluding that G&A Sales no longer

10. *See In re Ames Dept. Stores, Inc.*, No. 06 Civ. 0471 (LAK) (S.D.N.Y. Mar. 9, 2006), Docket #2943.

11. District Court Decision at 1.

12. *Id.*

> exists and is unable to pay any amount for which it otherwise might have been liable to the Debtors, there has not yet been any determination as to whether there is any liability. Moreover, the record does not establish that G&A Sales does not exist or that it would be unable to pay any liability that it might have to the Debtors. To the extent there are indications of which the Court properly may take note, they suggest that G&A Sales still exists, although it probably is not actively engaged in the conduct of business.[13]

Finally, Judge Kaplan also considered whether the appeal passed muster under the applicable standards for considering interlocutory appeals, and concluded that it did not.[14]

In the present motion, ASM now asks this Court to enter a new order (the "New Order"), restating the Findings of Fact and Conclusions of Law that were the underpinnings for the Initial Order, and making new findings as to events after the entry of the Initial Order, so that ASM can now seek appellate review of the Initial Order, and/or the New Order—presumably so that ASM can argue that one or the other of them now passes muster under appellate finality standards. Then, in what seems at first blush to be a new request, ASM also seeks an order from this Court ordering payment on a

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13. *Id.* at 2.

14. *Id.*

reclamation claim—though when the request is scrutinized, it appears that the reclamation claim is one of the claims ASM acquired from G&A as to which this Court already ruled in the Initial Order, and that the reclamation claim argument is an alternative legal theory that was not previously raised.

The Avoidance Action

As facts relevant, or assertedly relevant, to this motion, the Court finds[15] that Ames commenced the Avoidance Action, in this Court, on June 17, 2003. On June 7, 2006, Ames secured a clerk's entry of default as a consequence of G&A's failure to defend the Avoidance Action. Thereafter, a letter mailed by the clerk's office of this Court, advising G&A of the entry of the default, was returned by the United States Postal Service as "not deliverable as addressed" and "unable to forward," and Ames secured a default judgment against G&A, in the amount of $825,138, which is unsatisfied.

The Court further finds that G&A filed a case under chapter 11 of the Code on May 6, 2003.[16] An order

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15. Under this Court's case management order, facts asserted in motion papers in contested matters are assumed true unless controverted. *See* Case Management Order #3, dated July 26, 2004, ¶ 2. None of the factual findings made here has been controverted.

16. This date precedes the commencement of the Avoidance Action. The timing is puzzling to this Court, as it would seemingly suggest that the commencement of the (Cont'd)

dismissing G&A's chapter 11 case was entered on February 10, 2005. Prior to the dismissal of the G&A chapter 11 case, G&A's assets passed to its secured creditor, U.S. Bank, leaving an asserted deficiency remaining to be paid to U.S. Bank in excess of $950,000.[17] At the time it filed its motion to dismiss, G&A had no free assets, no ongoing operations, and no ability to reorganize.[18] The Court finds that there is no reasonable basis to believe that at the time G&A's chapter 11 case was dismissed, G&A had any remaining assets to provide a recovery for its other creditors—including, as relevant here, unsecured creditors, as Ames would be. The Court further finds that there likewise is no reasonable basis to believe that after its chapter 11 case was dismissed,

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Avoidance Action was a violation of the Automatic Stay in G&A's chapter 11 case. *See* Bankruptcy Code section 362(a)(1) (proscribing, among other things, commencement of litigation that could have been brought before bankruptcy filing, and proscribing efforts to collect on prepetition debt). The Court assumes that Ames was unaware of G&A's bankruptcy filing; certainly there is nothing in the record in this Court to suggest Ames was aware of the G&A bankruptcy filing when the Avoidance Action was commenced, or that a violation of G&A's automatic stay, if any, was intentional.

17. *See* G&A's motion to dismiss its chapter 11 case, *In re G&A Sales, Inc.*, No. 03-13914-KT (Bankr. C.D. Cal.), Docket #99.

18. *Id.* ("At this point, the Debtor has no means to enable it to distribute any assets and/or satisfy the claim of U.S. Bank or any other creditor and has no ongoing operations.").

G&A had any business or means to acquire new assets from which its debts might be satisfied.

Nevertheless, it appears, and the Court finds, that G&A has not been formally dissolved, and instead its legal status is "suspended." Ames has retained a collection agency charged with recovering on the $825,000 default judgment it secured. But the Court finds that it is highly unlikely that the collection agency would have any means to collect on the judgment, and that it is highly unlikely that Ames will recover on the judgment, or any material part of it.

In this context, ASM asks this Court to make a finding that the Avoidance Action has been "resolved"—presumably so ASM can tell the district court that the "resolved" requirement, at page 2 of the Initial Order,[19] has now been satisfied. In this Court's view, the district court is entitled to this Court's understanding of what this Court meant when it signed an order requiring the Avoidance Action to be "resolved." And this Court believes it should make a finding as to that—though without telling the district court what it should do with that information.

As a fact or mixed question of fact and law, then, this Court advises that when it signed the order put before it, this Court understood its order to mean that the claims of G&A held by ASM would be temporarily disallowed until each of two things had happened: that

19. *See* page 5 above.

(1) the Avoidance Action against G&A was "resolved"; and (2) G&A had paid the amount (or turned over any property), if any, that had been judicially determined to be payable to the Ames estate.[20] Thus "resolved" as used in that context was a reference to what would happen in the judicial process—such as judicially determining whether there was a voidable transfer, and, if so, the amount that would have to be paid back.[21] The actual payback was a separate requirement for allowance, following an "and," addressed in the second clause of the decretal paragraph.

Thus, on these facts, unless the Avoidance Action judgment was a nullity, by reason of the apparent violation of the automatic stay (a matter that neither side has briefed, argued, or otherwise addressed, and which this Court accordingly does not decide), the Avoidance Action has been "resolved"—as it has now been concluded, with a judgment in Ames' favor. But the second requirement in that decretal paragraph remains unsatisfied—as the judgment has not been collected upon.

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20. In this regard, the Court believes in retrospect that the order should have provided that the amount, if any, "be paid," rather than having required *G&A* to have paid it. Nobody raised the distinction at the time. Since, however, there is no indication that anyone else would pay it, the distinction is inconsequential in this case.

21. Thus the action would be "resolved" if there were a determination in the Avoidance Action that G&A didn't owe anything, or if there were a determination that it had a liability to the Ames estate, in some judicially determined amount.

The Court thus finds, as a fact or mixed question of fact and law, that the section 502(d) disallowance remains in effect.

But by reason of the circumstances described above, the Court finds that while the judgment has not been collected upon, there is no reasonable likelihood that it will be. And (as facts that presumably will be argued by both sides in contending that there was or wasn't the requisite finality) the Court finds that plainly G&A did not satisfy the conditions section 502(d) imposes, or all of the conditions that this Court's Initial Order required, to permit allowance of a claim, and has no realistic prospects for doing so in the future. Nor did ASM or anyone else satisfy section 502(d)'s requirements, and it is likely, if not certain, that it would not be in ASM's economic interest to do so.

As a matter of bankruptcy law, a section 502(d) disallowance is a temporary one. As a practical matter, by reason of the additional facts this Court now has found, the section 502(d) disallowance here will likely be permanent—though it could be avoided by ASM's making an economically disadvantageous payment of the amount for which G&A is liable to Ames.

In this Court's view, a simple finding that the Avoidance Action "is now resolved," without the more extensive discussion set forth above, would be misleading. Instead, the Court is setting forth the more detailed and precise factual findings set forth above, and will so order this decision, with each side free to argue

the finality facts to the district court as it sees fit—and, of course, for the district court to draw such conclusions as to the requisite finality as it sees fit.

The Reclamation Claim Administrative Expense Claim

Recovery on the $33,000 reclamation administrative expense claim could be affected by the facts described above, and/or any legal analysis applicable to administrative expense claims generally. But there are no new or additional facts supporting treatment of the reclamation administrative expense claim in any way different than the other administrative expense claim.

As a preliminary matter, the Court finds, to the extent it is not already established, that the reclamation administrative expense claim is one of the claims that the Court disallowed previously. It is not a new claim, warranting new consideration. The reclamation argument is in substance a new legal argument with respect to a claim whose allowability the Court has already considered and determined.

Additionally, the Court finds, as a fact, with respect to the order upon which the reclamation argument is based, that this Court did not then address all potential issues associated with administrative expense treatment for reclamation claims. The order provided, in relevant part:

> ORDERED, that entry of this Order is without prejudice to all of the Debtors' rights, claims

> and defenses regarding all of the claims listed or relating to the claims set forth in the Report, and all such claims, rights and defenses are expressly preserved.[22]

Thus, as a fact or mixed question of fact and law, the Court concludes and finds that the Reclamation Claim has at all relevant times been subject to any and all applicable defenses, including those based on section 502(d) of the Code.

Discussion

In its request for the New Order, ASM asks this Court to make a finding that the Avoidance Action "is now resolved."[23] And ASM then asks this Court, by means of the decretal paragraphs in its proposed "Supplemental Order," to state once more the findings of fact and conclusions of law that were the underpinnings for the Initial Order,[24] and to state once more the determination of the Initial Order.[25] The purpose of repeating findings and conclusions this Court already made, as candidly acknowledged by ASM, is to

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22. Order Approving Reclamation Claims Report and Authorizing Interim Distribution to the Holders of Valid Reclamation Claims at 3 (June 13, 2003), Docket #991.

23. *See* Proposed Order, Motion Exh. 10, at 2, in last boldfaced "Found" paragraph.

24. *See id.* at 3, in first boldfaced "ORDERED" paragraph.

25. *See id.*, in third boldfaced "ORDERED" paragraph.

facilitate ASM's efforts to secure appellate review of the earlier findings and conclusions.

In substance, then, ASM asks this Court to make a determination to affect another determination—as to the finality standards necessary to be satisfied for appellate review by the district court.[26] ASM expresses its belief that the New Order, "if entered as presented," will be a final order, from which it will be in a position to pursue an appeal.[27] In opposition, Ames argues at some length that "ASM's proposed 'supplemental' order would not be a final, appealable order."[28]

But in this Court's view, the extent to which any supplemental findings this Court might make affect

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26. ASM may also have in mind review by the Court of Appeals, which has its own finality standards, but this Court will not burden the discussion here by including, in every arguable relevant place, additional references to the Court of Appeals.

27. *See* Motion ¶ 14:

> It is ASM's belief that the annexed Supplemental Order, if entered as presented, is a final order, as the liability of G&A Sales has been established. Accordingly, ASM will be in a position to pursue its appeal, regarding the issue of whether Section 502(d) of the United States Bankruptcy Code is applicable to administration claims, such as those held by ASM.

(Apparent typographical errors corrected).

28. Ames Opp. ¶ 27. *See* generally Ames Opp. ¶ ¶ 27-34, 38.

finality determinations in the district court is not a matter for this Court to decide. And neither ASM nor Ames has brought any authority to the attention of this Court, nor is this Court aware of any, suggesting that the responsibilities of a trial court include making or shaping rulings, or entering orders, to facilitate, or thwart, appeals.

Rather, in this Court's view—at least in cases, like this one which are not subject to the BAPCPA amendments to 28 U.S.C. § 158 providing for bankruptcy court level certification of important issues to the Circuit (for the Circuit then to accept or decline as it sees fit)—the bankruptcy court's responsibilities instead involve merely deciding the underlying issues, as well as possible, and then letting the chips fall where they may with respect to the power, or inclination, of higher courts to review those issues on appeal. It is the province of the *district court* to determine whether its requirements for appellate finality have been satisfied, not this Court. And at least until and unless a higher court asks, this Court does not believe that it should be telling a higher court whether this Court's order is "final" for purposes of the exercise of the higher court's appellate jurisdiction, or that this Court should be entering orders whose purpose or effect is to influence that determination.

Likewise, for the reasons set forth in this court's Findings of Fact above, this Court does not believe that it appropriately can or should make a standalone finding that the Avoidance Action "is now resolved" without also

setting forth all of the other facts and considerations that it addressed in its Findings of Fact above.

As to the Reclamation Claim, the Court declines to issue the separate relief requested in the New Order for the reasons set forth above and additional ones. Aside from the reasons set forth above, the Court notes that the Reclamation Claim was one of the two claims whose allowance was addressed in the Initial Order. At best, the motion now represents an additional legal theory on which the desired monetary payment then might have been argued to be appropriate.[29] ASM did not seek (and indeed disclaimed seeking) reargument—understandably, as there was no contention that there was any matter of fact or law that this Court overlooked. In any event, as this Court has found as a fact or mixed question of fact and law,[30] the Reclamation Order was plain in stating explicitly that rights under it were without prejudice to Ames' defenses with respect to the reclamation claims, and section 502(d) defenses were plainly encompassed within that reservation of rights.

Conclusion

Factual findings have been made as set forth above.

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29. The Court notes, in that connection, that ASM has never been seeking return of the goods that were the subject of the original reclamation claim, but rather wants an administrative expense claim for the reclamation claim's dollar value.

30. *See* page 11 above.

The Motion is otherwise denied.

SO ORDERED.

Dated: New York, New York
December 1, 2006

s/ Robert E. Gerber
Robert E. Gerber
United States Bankruptcy Judge

APPENDIX D — CORRECTED ORDER GRANTING IN PART AND DENYING IN PART REQUEST OF ASM CAPITAL, LP FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIMS OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 5, 2005

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Case No. 01-42217 (REG)
Jointly Administered

In re

AMES DEPARTMENT STORES, INC., *et al.*,

Debtors.

CORRECTED ORDER GRANTING IN PART AND DENYING IN PART REQUEST OF ASM CAPITAL, LP FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIMS

Upon the Request, dated April 6, 2005 (the "Request"), of ASM Capital, LP ("ASM"), for entry of an order, pursuant to section 503 of title 11, United States Code (the "Bankruptcy Code") (i) allowing all administrative expense claims held by ASM, including those administrative expense claims purchased by ASM from entities against whom Ames Department Stores, Inc. and its subsidiaries, as debtors and debtors in possession (collectively, "Ames" or the "Debtors") have

commenced an action to avoid prepetition transfers pursuant to sections 547, 550, and 551 as well as other relevant provisions of the Bankruptcy Code (the "Avoidance Actions"), and (ii) directing the Debtors to pay such administrative expense claims, as more fully set forth in the Request; and an objection to the Request, dated April 15, 2005 (the "Objection"), having been filed by the Debtors; and the Court having jurisdiction to consider and determine the Request as a core proceeding in accordance with 28 U.S.C. §§ 157 and 1334; and a hearing (the "Hearing") to consider the Request and the Objection having been held before the Court on September 7, 2005; and sufficient cause appearing therefor, it is

ORDERED that, for the reasons set forth on the record of the Hearing, the Request is granted in part and denied in part; and it is further

ORDERED that, pursuant to section 503 of the Bankruptcy Code, the claim of Delaware Ribbon Manufacturers against the Debtors (the "Delaware Ribbon Claim") held by ASM shall be deemed allowed in the amount of $117,290.52; and it is further

ORDERED that, pursuant to section 503 of the Bankruptcy Code, the claim of Commonwealth Wholesale Corp. against the Debtors (the "Commonwealth Wholesale Claim") held by ASM shall be deemed allowed in the amount of $61,488.00; and it is further

ORDERED that, pursuant to section 503 of the Bankruptcy Code, the claim of the Washington Post against the Debtors (the "Washington Post Claim") held by ASM shall be deemed allowed in the amount of $121,129.66; and it is further

ORDERED that, pursuant to section 503 of the Bankruptcy Code, the claim of Williamson-Dickie Mfg. Co. against the Debtors (the "Williamson-Dickie Claim," and together with the Delaware Ribbon Claim, Commonwealth Wholesale Claim, and Washington Post Claim, the "Allowed Claims") held by ASM shall be deemed allowed in the amount of $271,225.20; and it is further

ORDERED that, pursuant to section 502(d) of the Bankruptcy Code, the claims of G&A Sales against the Debtors held by ASM shall be disallowed until the Avoidance Action against G&A Sales is resolved in the Debtors' chapter 11 cases and G&A Sales has paid the amount, or turned over any such property, for which G&A Sales is liable to the Debtors; and it is further

ORDERED, that, notwithstanding the foregoing decretal paragraph, nothing contained herein shall be deemed to be a determination of the merits of the claims of G&A Sales against the Debtors held by ASM; and it is further

ORDERED that the Debtors shall treat the Allowed Claims in the same manner as other allowed administrative expense claims in the Debtors' chapter 11 cases; and it is further

ORDERED that, consistent with the Debtors' treatment of other allowed administrative expense claims, the Debtors shall offer to pay ASM a dividend equal to forty percent (40%) of the face amount of the Allowed Claims and the balance when the Debtors pay other similarly situated holders of allowed administrative expense claims; and it is further

ORDERED that the Debtors are authorized to execute and deliver all instruments and documents, and take such other action as may be necessary or appropriate, to implement and effectuate the transactions contemplated by this Order.

S/ Robert E. Gerber
UNITED STATES BANKRUPTCY JUDGE

Dated: New York, New York
December 5, 2005

APPENDIX E — EXCERPTS OF CORRECTED TRANSCRIPT OF BANKRUPTCY COURT DECISION DATED SEPTEMBER 7, 2005

[Commencing at page 29]

* * *

THE COURT: Gentlemen, this being a matter of first impression in this District and Circuit, under normal circumstances I would prefer to write on it, and I may still do so. However, I think I have a responsibility to you all to issue you a decision on a real time basis, and accordingly I'm going to give you a decision now and the outline of the reasons for it — reserving the right, albeit arguably an unrealistic one, to write more expansively if other matters that are in the pipeline can be addressed and then give me the opportunity to do so.

Gentlemen, I am ruling that I must follow the analysis of the Ninth Circuit BAP in MicroAge[1] and the earlier decision in Georgia Steel[2] and to regard their approach as superior to that of Judges Walrath and Walsh, two judges who I so respect, in CM[3] and Lids.[4] Therefore, I find that just as [section] 502(d) applies to pre-petition claims, it also applies to post-[30] petition administrative claims.

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1. 284 B.R. 914 (9th Cir. BAP 2002).

2. 38 B.R. 829 (Bankr. M.D. Ga. 1984).

3. 264 B.R. 141 (Bankr. D. Del. 2000).

4. 260 B.R. 680 (Bankr. D. Del. 2001).

Appendix E

However, I am further ruling that the analysis must be done on a claim by claim basis, rather than a creditor by creditor basis, and that accordingly [section] 502(d) applies to the claim, and not to the holder of the claim. And as a consequence, ASM is entitled to administrative expense allowance of its so-called "clean" claims even though it is not entitled to administrative expense allowance of its so-called "dirty" claims.

I am further holding consistent with Judge Gallett's decision in Microvideo,[5] as affirmed ultimately by the Second Circuit,[6] based substantially on his analysis.

Now, what this means vis-a-vis the clean claims is that Mr. Ochs' client ASM becomes entitled to the offer that was made to the creditor community generally, insofar as it [the offer] applies to its [ASM's] clean claims, or, alternatively, must wait until all administrative expense claims are paid to ensure that it does not get the equivalent of a post-petition preference. Or that putting it another way, in its most primitive terms, the fact that it [ASM] will have an allowed administrative expense on the clean claims does not mean that it is entitled to immediate payment, but rather would be entitled to pro rata payment with the other delayed admin claim. The following being the bases for this decision.

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5. 232 B.R. 602 (Bankr. SDNY 1999).

6. 227 F.3d 474 (2d Cir. 2000) (per curiam).

Appendix E

We talked in oral argument about the fact that there is no decision either of the Second Circuit or of the Southern [31] District of New York on point. Judges Walsh and Walrath, in CM and Lids, did in my view a very fine job of parsing the issues in that case, but when I later read the subsequent decision of the Ninth Circuit BAP in MicroAge, the view of that court (one which, as I noted in oral argument, is to those of us in the bankruptcy community what the Second Circuit in 1948 was to the analysis of the law generally), is quite frankly superior. It [the 9th Cir. BAP] considered and ultimately rejected the analyses of Judges Walrath and Walsh in Lids and CM, because principally they had considered one of the countervailing policies (the incentive or the desirability of incentivizing folks to deal with a post-petition estate and to enter into voluntary transactions with a debtor-in-possession) without considering sufficiently the second of the two legislative policies underlying our jurisprudence in this area — which is the legislative desire to incentivize people to pay back pre-petition transfers which gave them a leg up against the creditor community generally.

Putting it another way, in bankruptcy we deal with people with strong equities on both sides of issues in a fight for limited assets. It doesn't mean one side is better or worse than the other. Congress has sometimes conflicting policies which it is trying simultaneously to implement to get the best result for all.

Mr. Ochs, you are plainly correct that Congress wants [32] to incentivize people to deal with post-petition

estates — although (and I wish I had the cases at my fingertips) the distinction between dealing with a pre-petition debtor, and a post-petition debtor-in-possession, while recognized in some of the cases, is by no means a uniform one, and the distinction has become blurred in recent years by jurisprudence which if I'm not mistaken is as high as the United States Supreme Court.[7] Yes, we want to incentivize people to deal with post-petition estates, but by the same token we want to incentivize people to give back preferences.

Now, that takes us back, therefore, to where we probably should have started from, which is not the competing policies involved but old fashioned statutory analyses principles. Number one is the plain meaning of the statute. As Mr. Karcher properly observed, Ron Pair[8] and other cases of similar import tell us that in analyzing the statute, the starting point is the words of the statute.

As the Ninth Circuit BAP in MicroAge stated, "claim" is broadly enough defined under [section] 101 of the Code to cover both pre-petition and post-petition claims. That is in contradistinction, gentlemen, to the definition of "creditor," which makes it clear that a "creditor" is the holder of a pre-petition claim,and not any claim. If you look at Section 101 of the Code (and

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7. *See NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 528 (1984).

8. 489 U.S. 235 (1989).

I'm reading from 101(10), folks), "creditor" means entity that has a claim against the debtor that arose at the [33] time of or before the order for relief concerning the debtor.

At the risk of stating the obvious, it does not say "creditor means an entity that has a claim against the debtor." It goes on to qualify "claim" because a "claim" can be one of two types. It can be a pre-petition claim, or it can be a post-petition claim, and a "creditor" is only one of those two types. It's one that has a claim against the debtor, and a special kind of claim — a claim that arose at the time of or before the order for relief — which of course in a non-involuntary [case] is the date of the filing of the Chapter 11 case.

So the Ninth Circuit BAP was plainly correct in observing that a claim can be one of two types, a pre-petition claim on the one hand, or a post-petition claim on the other

Now, sometimes we judges have hard issues to deal with when the legislative history cuts against the plain meaning of the statute. But here I don't have to decide whether I should apply that principle here,[9] because the legislative history and the plain meaning of the statute coincide. And as the House Report noted, [section] 502(d) carries over the principles embodied in the pre-Code analysis of former § 57g of the old [Bankruptcy] Act.

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9. *Sic*. Should have said "whether I should deal with such an issue here."

Appendix E

We've talked in oral argument about the 57g jurisprudence, and it was noted in the briefs, albeit not in the oral argument, that when we have a body of interpretative law under the old Act we look to see the extent, if any, to which [34] Congress evidenced any intention to legislatively overrule — to overrule by statute — the earlier Act jurisprudence. Here, not only do we not have such an intention; we have an intention to the contrary.

If I can find fault in the decisions of two judges whom I so eminently respect, I think the Ninth Circuit BAP did a much better job in considering the significance of § 57g than did my two brothers and sisters in Delaware.

I also should say that I don't believe the expressio unius argument, that was articulated most significantly by Judge Walsh, quite got its arms around the entirety of the issue, because it failed to address other provisions of the Code articulated by the Ninth Circuit BAP in MicroAge, that point out how "claims" in some instances are defined more broadly to include post-petition as well as pre-petition claims.

Accordingly, I feel that for the reasons I articulated, and for the remainder of those set forth in MicroAge — MicroAge, to note again, having considered and rejected the analysis in Lids and CM, three very fine judges on that panel I might add, and having instead adopted the analysis of Georgia Steel — I believe the MicroAge court got it right and I must follow MicroAge.

That is the first of the essentially three issues that I must deal with on this. The second issue is that I do not, of course, have a claim by the underlying vendors who [35] originally provided the post-petition services or goods to the debtors but rather they assigned their administrative claims to a claims transferee.

I stated at the outset of oral argument, and I will state again, that a trader in claims — whether called that, whether called a distressed debt investor, or called one of the less complimentary names that some folks choose to use — has no lesser rights in the Bankruptcy Court, assuming an appropriate transfer of the claim, than does the assignor of the claim. By the same token, it has no greater rights.

It [a claims assignee] cannot, as the debtor used in its oral argument, be used to launder claims, but Mr. Ochs to his considerable credit didn't make any such contention. Mr. Ochs played it right down the middle. We should all play it right down the middle. An assignee has no lesser rights, nor does it have any greater rights. It has the same rights as its assignor, taking its claims subject to defenses that are good against the assignor.

Here we have a situation where, putting aside the two folks whose claims give rise to similar issues, certain assignors were subject to 502(d) defenses by reason of my first ruling, and two others are not. The issue with which T am then presented is whether the so-called dirty claims that were acquired as part of the bundle of claims by the assignee ASM so infect the remainder that the

estate can validly deny a [36] recovery on the so-called clean claims just as it can on the so-called dirty claims.

After considering the matter, even though it was less thoroughly briefed than the remainder of the issues, I think that it is clear that the claims must be considered individually, and that the happenstance that the claims acquiror acquired dirty claims does not deprive it of its entitlement with respect to the clean claims. So far as I'm aware, this is also an issue of first impression, but I think that the answer comes out fairly clearly out of 502(d) of the Code.

[Section] 502(d) provides, in relevant part, "notwithstanding subsections A and B of this section, the Court shall disallow any claim of any entity from which property is recoverable under Sections . . ." — and then it goes on. I think its fair to say that these are the Chapter 5 avoidance actions. Notice, gentlemen, that it does not say "the Court shall disallow *all* of the claims of any entity from which property is recoverable." And it is also the case that property is not recoverable from the claims assignee. It just has forfeited its right to recover on the claim by reason of the avoidance rights against its assignor.

It seems to me that since the Code, section 502(d), does not say "the Court shall disallow the claims held by any entity," it looks on a claim by claim basis. It does not refer to the entity. It does not refer to the creditor. It refers to the [37] claim itself. It seems to me that 502(d) must be applied on a claim by claim basis. Now,

in many cases that won't lead to a different result, but it appears to me that it must be dealt with on a claim by claim basis. Since the property is not recoverable from the claims assignee, the fact that the claims assignee may hold some dirty claims and it may hold some clean claims makes 502(d) applicable to the dirty claims but not to the clean claims, and that's the way I'm holding.

As I said, folks, I wish I had the luxury of writing on this. I don't. But hopefully this provides a sufficiently detailed basis for the reasons underlying my decision. And I think the MicroAge court got it right, and I am ruling in accordance with MicroAge, recognizing, once more, a fairly plain conflict in the case law on this issue.

Mr. Ochs, you are to work cooperatively with Mr. Karcher in an effort to formulate an order in accordance with this ruling, which will state in substance that for the reasons set forth on the record, the motion is granted in part and denied in part, "as follows." Then laying out the determination on a claim by claim basis. Such a cooperative effort is to be without prejudice to the rights of either side to appeal or cross-appeal from this determination.

In the unlikely event that you folks cannot agree upon the form of an order — emphasizing once more that it's [38] without prejudice to each side's rights to appeal or cross-appeal — then you are to settle an order on no less than two days business days notice by hand or by fax. The time to appeal shall run from the date of entry of the resulting order, and not from the date of this oral decision.

Appendix E

At the risk of providing an advisory opinion, this determination shall be stare decisis but not res judicata with respect to the two claims that are not the subject of this motion. Perhaps you folks can work out a stipulation that says that the ultimate determination with respect to the remaining claims shall be in conformity with the ultimate decision, whether it's mine or that of the higher court on what I'll call the trailblazer claims.

I must tell you that unless folks bring facts to my attention that are not now known to me, I am not aware of any principled distinction under which the other claims should be dealt within a different way than these would be, but I am not going to give you an advisory opinion on that.

Folks, not by way of reargument, are there any open issues? Mr. Karcher?

MR. KARCHER: Nothing further, Your Honor.

THE COURT: Mr. Ochs?

MR. OCHS: No. Thank you, Judge.

THE COURT: Okay. Have a good day, folks.

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APPENDIX F — EXCERPTS OF TRANSCRIPT OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AUGUST 29, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case No. 07-1362-bk

IN RE AMES DEPARTMENT STORES, INC., et al.,

Debtors.

ASM CAPITAL, LP,

Appellant,

- against -

AMES DEPARTMENT STORES, INC., et al.,

Debtor-Appellees.

August 29, 2008

[Commencing at page 12]

JUSTICE CALABRESI: So your argument is basically that if we were to rule the way the district court did, the practical effect of that is to exclude from the available parties who can continue to serve the debtor anyone who can potentially be charged with a preference. And that makes the workout much more difficult.

MR. BUTLER: That's one possible outcome. Another possible outcome is that the trustee or debtor-in-possession simply gives up on all the preferences which are potential valuable resources of the estate because it needs a particular vendor to continue to do business.

JUSTICE CALABRESI: Yeah. Okay.

JUSTICE SOTOMAYOR: How about the reverse? Isn't there an incentive for creditors to push for preferences and then move to the favored position as administrative vendor because they can avoid the payment of the preferences and still get their administrative costs?

MR. BUTLER: I think the Microage Court suggested that that might be the case. I think in the real world of business if you're doing business with someone and you have an additional risk of payment and time value of payment, if your payment is going to be withheld until such time as a preference is resolved or if there's a risk you won't get paid because of it, you're handing your potential opponent in a litigation some substantial financial leverage because there are additional [13] sums due and owing. I think as a practical matter in the real business world that having the potential for a preferential recovery undermine your payment rights for administrative expenses would, in fact, disincentivize the claims trader.

JUSTICE PARKER: But I don't quite understand. If you take that just one little half step further, what's the policy justification for giving me a walk on preference? Is it simply because I continue to supply services?

MR. BUTLER: I don't think there's any policy justification of that. And we're not contemplating giving them a walk. Preferences are still recoverable under the Code and by judicial order. They can be compelled.

JUSTICE PARKER: That's not really true because your claim has essentially been kind of washed through to you. You can get the money and you don't really have to eat the preference amount.

MR. BUTLER: In this particular case of the claims trader, yes. But I think what we're talking about here is the interpretation of the statute itself and I think it's much broader than that.

JUSTICE PARKER: Yeah, but once — let's assume we resolve this in your favor. Can't you foresee a regime where the claims trading business all of a sudden just kind of takes off because you could now just sell the claim for whatever you can get for it and then I've got the claim, I can pursue it [14] against the estate without — and then just leave the preference action in the same sort of situation that G&A was in here.

MR. BUTLER: Some of those concerns might be relevant to the Springfield v. Enron bona fide purchaser

issue. But I don't think those concerns enter at all into the statutory construction —

JUSTICE SOTOMAYOR: How not? How not?

MR. BUTLER: Because —

JUSTICE SOTOMAYOR: I mean, let's assume that a purchaser or a seller of administrative expenses has now recognized is that they never — you know, paying back the preferences is just too onerous for them. So they're going to do what you asked here. They're going to declare bankruptcy and just sell you their claim. How in the world do we protect against creating a business where people do exactly this, incur administrative expenses and then just go out of business to avoid paying the preferences?

MR. BUTLER: Well, I think — nobody, I don't think, chooses to go out of business. And —

JUSTICE CALABRESI: Is it possible for creditors or someone to put a lien on the payment for the administrative expenses and make that payment not be part of the general pile but be available as a paid back transgressor. That is, you were trying to separate out the monies that you were being paid [15] — that was being paid toward the administrative expenses and say, well, the preference of that may still be paid. The question is what happens to the money for that. Is there any way in which creditors can protect the preference money that you paid?

MR. BUTLER: By a lien against the administrative expense payment?

JUSTICE CALABRESI: A lien against what you paid to buy the right to —

MR. BUTLER: Oh, to buy the claim from a main party?

JUSTICE CALABRESI: So that to the extent that the seller has money before that isn't affected; that's a preference which would go. But you paid something and that might be something that now has gone into the — it might be available.

MR. BUTLER: That's an interesting concept since these are private commercial dealings and many of these claims are barred on the market. As a practical matter, I'm not sure how that would work. And I think that issue may be covered in the whole concept of being a bona fide purchaser. If the —

JUSTICE CALABRESI: — bona fide purchaser —

MR. BUTLER: Right.

JUSTICE CALABRESI: — which is something that —

JUSTICE PARKER: Okay. You don't have to reach that.

JUSTICE CALABRESI: Thank you.

* * * *

APPENDIX G — 11 U.S.C.A. § 503

§ 503. Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)

(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

(B) any tax—

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

(6) the fees and mileage payable under chapter 119 of title 28.